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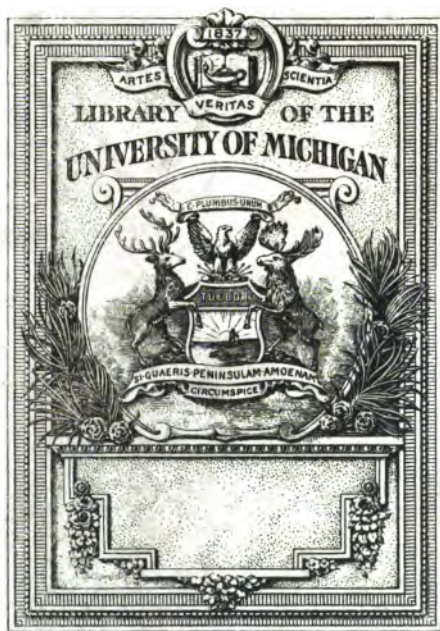
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# COMMERCIAL LAW



# COMMERCIAL LAW

AN ELEMENTARY TEXT-BOOK FOR  
COMMERCIAL CLASSES

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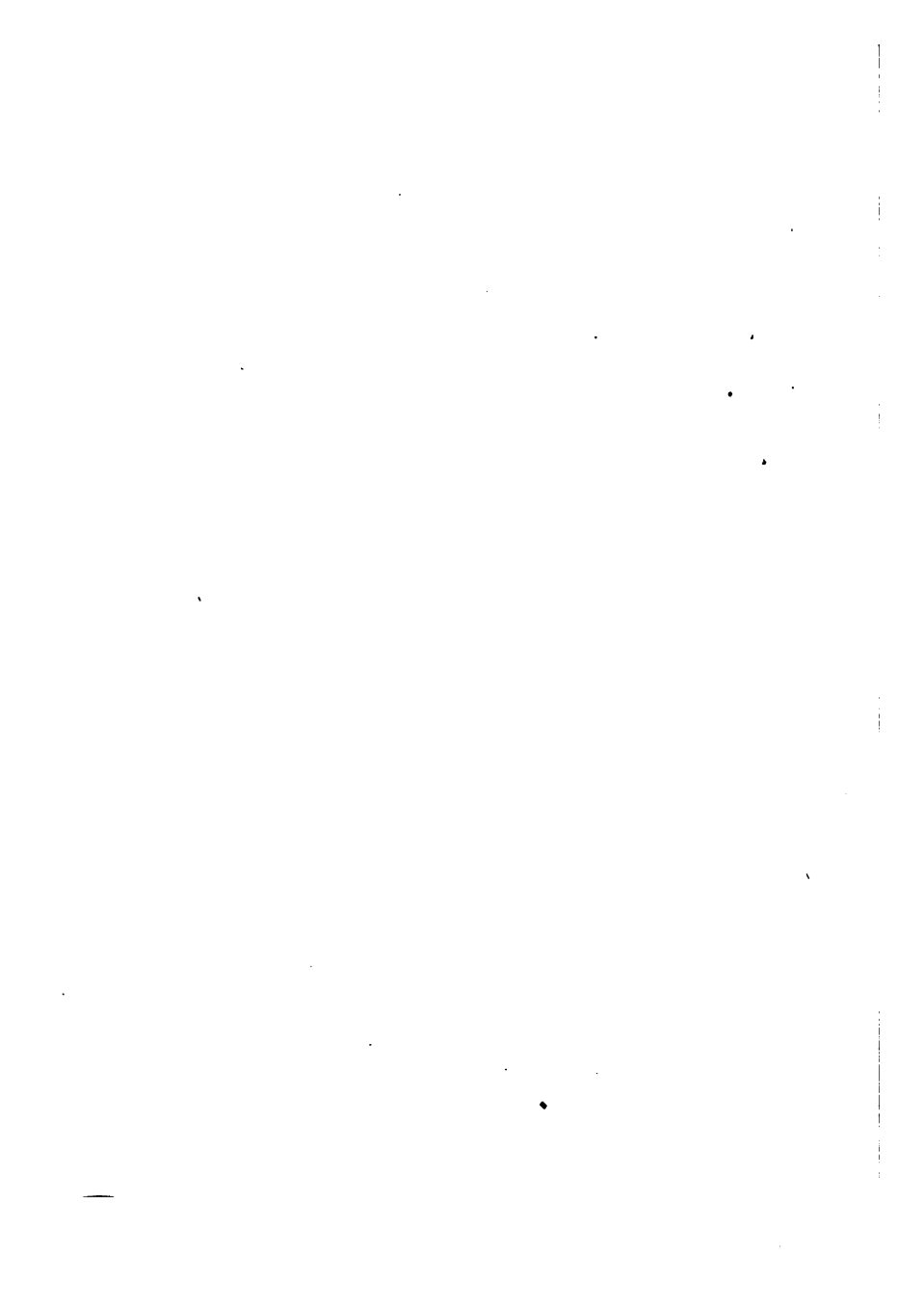
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## PREFACE

THE object of this little book is to provide an elementary text-book on Commercial Law for schools and colleges. Lectures on Commercial Law are now given every winter in many of our large towns. These lectures attract bankers, accountants, and young business men. The want of a text-book has long been felt, as the existing works are too advanced for practical use. In writing this work I have aimed at brevity and simplicity of statement. As a rule cases are not quoted, but many of the illustrations embodied in the text are taken from decided cases. At the end of each chapter or part, reference is made to the leading text-books, to which the reader is referred for further information.

As the book is written mainly for those who are unfamiliar with legal terms, I have added a "glossary" of some terms used in the text that seemed on reading the proofs to require explanation. I have to express my grateful thanks to Dr. James Gow, the editor of the series, Mr. William Baker of Lincoln's Inn, and Mr. J.

C. Graham of the Inner Temple for kind assistance and valuable suggestions during the progress of the work.

I have also to thank Mr. John Macdonell, one of the editors of Smith's *Mercantile Law*, and Mr. T. E. Scrutton, the author of *Charter-parties and Bills of Lading*, for permission to use the forms of a charter-party and a bill of lading printed in the text.

J. E. C. MUNRO.

2 NEW SQUARE,  
LINCOLN'S INN.

# CONTENTS

## PART I

	PAGE
MERCANTILE PERSONS AND MERCANTILE PROPERTY	I

## PART II

### CONTRACTS

CHAP.		
I.	THE FORMATION OF CONTRACTS . . . . .	11
II.	CAPACITY OF PARTIES TO CONTRACT . . . . .	18
III.	THE FORM OF AND CONSIDERATION FOR CONTRACTS	25
IV.	THE LEGALITY OF THE AGREEMENT . . . . .	34
V.	POSSIBILITY OF PERFORMANCE . . . . .	38
VI.	EFFECTS OF MISTAKE, MISREPRESENTATION, OR FRAUD . . . . .	40
VII.	THE ASSIGNMENT OF CONTRACTS . . . . .	47
VIII.	PERFORMANCE, BREACH, AND DISCHARGE OF CON- TRACTS . . . . .	50

## PART III

### THE LEADING COMMERCIAL CONTRACTS

I.	PARTNERSHIP . . . . .	54
II.	PRINCIPAL AND AGENT . . . . .	60

CHAP.	PAGE
III. THE SALE OF GOODS . . . . .	69
IV. INSURANCE . . . . .	94
V. GUARANTEES . . . . .	107
VI. CHARTER-PARTIES AND BILLS OF LADING . . . . .	112
VII. BILLS, NOTES, CHEQUES, AND I.O.U.S . . . . .	134

## PART IV

BANKRUPTCY . . . . .	143
----------------------	-----

## PART V

THE APPLICATION OF LAW . . . . .	154
----------------------------------	-----

## APPENDIX

GLOSSARY . . . . .	160
PROPOSAL FOR LIFE INSURANCE . . . . .	163
FORM OF LIFE POLICY . . . . .	164
FORM OF MARINE POLICY . . . . .	167
QUESTIONS . . . . .	169
INDEX . . . . .	183



## PART I

### MERCANTILE PERSONS AND MERCANTILE PROPERTY

§ 4  
§ 1. **Mercantile Persons.** — Commercial transactions are carried on by individuals or sole traders, partnerships, companies, and by their agents.

§ 2. **Sole Traders.** — No distinction is now drawn between subjects and aliens as regards capacity to trade, except that an alien cannot own a British ship. If an alien purchase a British ship, the ship thereupon ceases to possess a British character. During war a subject cannot trade with the enemy except by license of the Crown.

Married women were formerly under trading disabilities, inasmuch as they could not bind themselves personally by contract except in the city of London. But now a married woman may carry on a trade as if she were single, when she has obtained a protection order or is living apart under a judicial separation. She can also bind herself so as to affect her separate estate by contract. In respect of her contracts she is in a more favourable position than a man. A man is liable to be imprisoned for disobeying an order of a court to pay a debt, but when a married woman with separate estate contracts a debt, she cannot be imprisoned, the property alone being liable (§§ 44-46).

Persons under twenty-one can, as a rule, bind themselves absolutely for necessities only (§§ 39-43).

The executors and administrators of a deceased trader are liable to see to the payment of his debts out of his assets, and may be concerned in carrying on the business. An executor is a person appointed as such by a will. An administrator is a person appointed by the Court of Probate where a man has died without making a will, or where he has made a will and has appointed no one as executor.

**§ 3. Partnerships.**—Partnership is the relation which exists between persons carrying on a business in common with a view to profit. Persons who enter into partnership with one another are called a firm. In Scotland the “firm” is legally a distinct person from the members, but this rule does not prevail in England, though English law recognises the firm for certain purposes. The relations of partners to one another will be considered in a subsequent chapter, but it may be here pointed out that each member of a partnership is an agent of the firm and of the other partners for the purposes of the business of the partnership. Third parties therefore in dealing with a member of a firm are dealing at the same time with the other members.

**§ 4. Companies.**—A company may be defined as a number of persons incorporated by law, so that the company has a distinct personality apart from the persons who compose it. An unincorporated company is merely a partnership, and has no legal existence apart from its members; contracts are entered into with the partners as individuals, and every member is liable for the debts of the partnership. In the case of an incorporated company, contracts are entered into with the company itself and therefore creditors can only proceed against the property of the company.

**§ 5. How Incorporation takes place.**—A company may be incorporated (a) by royal charter; (b) by special Act of Parliament; (c) by a certificate issued under an Act of Parliament.

(a) The Crown in virtue of its prerogative may incorporate a number of persons as a company. In

some cases charters are issued under and by authority of Acts of Parliament, as, for example, the charter incorporating the Bank of England.

- (b) Sometimes an Act of Parliament is specially passed for the purpose of incorporating a company. For example, railway companies are often formed by special Acts.
- (c) Under the Joint Stock Companies Acts, seven persons can obtain a certificate of incorporation as a company, provided certain conditions are fulfilled. The seven persons usually subscribe their names to two documents, called the memorandum and the articles of association respectively. The memorandum is a concise statement of the objects of the company; the articles are the rules to be followed in carrying out such objects. A memorandum is essential, but the articles are not absolutely necessary, the Acts containing articles that apply where special articles have not been framed. The registrar of joint stock companies issues a certificate that has the effect of incorporating into a company the persons who sign the memorandum, together with such other persons as may from time to time become members of the company.

**§ 6. Limited and Unlimited Liability.**—The memorandum of a limited company must state that the liability is “limited,” and to what extent. In a limited company the liability of members for the debts of the company is limited to the amount stated, and it is usual to limit the liability to the amount of the shares held. In an unlimited company the liability of members is unlimited. In no case, however, can a creditor of a company sue a member of the company for a debt contracted by the company. Creditors have to be content with taking proceedings against the company itself, and if the company cannot pay, proceedings, as we shall see later on, may be taken to wind up the company, and the law will compel every member to contribute that which is due from him in respect of his shares. If the liability, for example, is limited to

£10 a share, and this has not been paid, no more than £10 can be demanded; if £5 has been paid, £5 can be demanded. On the other hand, if the liability be unlimited, each member can be compelled to contribute until all the debts of the company are discharged.

**§ 7. Seven Members required.**—If a company carries on business for six months after the number of its members is less than seven, every member who is aware that the number of members has been reduced below the number prescribed by law, becomes personally liable for the payment of all the debts of the company contracted subsequent to such six months. Care therefore should be taken so that the number of members is never less than seven.

**§ 8. The Memorandum.**—The law requires the memorandum to contain the following particulars in the case of an “unlimited” company:—

1. The name of the company.
2. The place where the registered office is situated.
3. The objects for which the company is established.

If the company be “limited,” the memorandum must also contain—

4. The word “limited” in addition to the name of the company.
5. A declaration that the liability of the members is limited.
6. The amount of capital divided into shares of a certain amount.

The memorandum is the charter of the company, and defines and limits the powers of the company. It cannot be altered without the consent of a court.

**§ 9. The Articles of Association.**—The articles of association prescribe the rules to be observed in the administration of the company's affairs. They usually relate to calls upon shares, the transfer and forfeiture of shares, the increase or reduction of capital, the borrowing of money, proceedings at meetings, the election, retirement and powers of directors, the auditing of accounts, the declaration of dividends, winding up, and the distribution of assets. As a rule the articles of association can be altered by the company.

**§ 10. Directors.**—The articles usually declare that the management of the business shall be vested in the directors. The shareholders are thus excluded from the management, though they necessarily exercise great control through their power of censuring or removing a director. The directors cannot validly do any act not within the powers of the company.

As a rule their powers are prescribed by the articles. The usual powers given are to acquire property, to enter into contracts, to appoint officials and trustees, to bring or defend actions, to give receipts, to refer disputes to arbitration, to invest moneys, to form a reserve fund, and to recommend the amount of the dividend.

**§ 11. Shares.**—The capital of a company is always, as we have seen, divided into shares. The persons who sign the memorandum and articles have to state opposite their names how many shares they take. Other shareholders obtain shares by applying for them. An application is accepted by the directors allotting the shares, and the posting of the notice of allotment to the applicant makes him liable to take and pay for the shares. The applicant is usually required to remit a portion of the amount of each share when he makes his application, and another portion when the shares are allotted to him. Subsequent payments are termed "calls," and the articles usually authorise the directors to make calls from time to time until the whole amount is paid. Certificates may be issued by the directors certifying the number of shares held by a shareholder, and such certificate is *prima facie* evidence that the holder owns the shares.

**§ 12. Winding up.**—A company may be wound up or dissolved (1) compulsorily, (2) voluntarily, or (3) subject to supervision.

1. The Chancery Division of the High Court of Justice will order a company to be wound up—

- (a) When the company has passed a resolution requiring the company to be wound up by the court.
- (b) When the company does not commence business within a year from its incorporation, or suspends business for a year.

- (c) Whenever the number of members is less than seven.
- (d) When the company is unable to pay its debts.
- (e) When the court thinks that it is just and equitable that it should be wound up.

The company itself, any shareholder, or a creditor may ask the court to make the order. If the order be made, a liquidator is usually appointed to assist the court; his chief duties are to realise the property of the company and to pay its debts so far as the property will permit.

2. A company may, without going to the court, wind up its affairs voluntarily, but this will not prevent a creditor from asking the court for a compulsory order. Voluntary winding up is often resorted to where it is desired to reconstruct the company on a new basis. The company authorise the winding up by resolution, and appoint a liquidator for the purpose.

3. In some case where a voluntary winding up has been resolved upon, the court may order the winding up to proceed under its supervision. This course has the advantage that the assistance of the court can be readily obtained when necessary.

By an Act of Parliament passed in 1890, the winding up of companies is subject to the control of the Board of Trade. The procedure is similar to that followed in bankruptcy.

**§ 13. Mercantile Property.**—Mercantile transactions relate usually to moveable property. Such property takes the form of a material thing or a right of action. A bale of cotton is a material thing, but a share in a company is really a right of action. Land or immoveable property is often required for trading purposes, and attention may therefore be directed to some of the more important forms of mercantile property and their chief characteristics.

**§ 14. Land.**—Land, where it is owned for partnership purposes, is regarded as partnership property. The law will not interfere with its descent, but it will compel the person who takes it to hold it for the benefit of the partnership (§ 116). Land is now liable for the payment of debts.

**§ 15. Moveable Property.**—Moveable property is the subject of absolute ownership, and hence parties buying

goods are not obliged to trace the title of the vendor, as they have to do in the case of land. Sales in open market as a rule confer a good title (§ 158). Moveables, with certain exceptions, such as heirlooms, fixtures, and growing crops, descend to the executor or administrator for the benefit of the next of kin, subject to the payment of debts.

Special rules are applied to British ships. In order to be entitled to the name and privileges of a British ship she must be owned and registered as one, except in the case of ships not exceeding 15 tons, employed on the rivers and coasts of the United Kingdom or of a British possession. The property in a British ship is regarded as divided into 64 equal parts, and it would apparently follow that 64 is the maximum number of owners. But the law allows any number of persons not exceeding five to be registered as joint owners, such joint owners being regarded as one person for the purpose of registration. A company, too, may be registered in its corporate name. Shares in a ship are transferred by a prescribed form of bill of sale under seal.

The word "chattel" is often used in England to denote moveable property, but the leading classification of property in English law is not "immoveables" and "moveables," but "real" and "personal" property. Personal property includes not only moveables, but certain interests in land, such as leaseholds—if the owner of such property dies intestate, the property descends to the next of kin after all debts have been paid. Real property includes all estates that amount to an interest not less than an estate for life.

**§ 16. Rights of Action.**—Moveable property is usually divided into material things and rights of action. The former class includes everything that is tangible or possesses a material form; the latter class includes all claims or rights, especially claims to the payment of sums of money. If A. possesses ten sovereigns, the sovereigns are material things; if B. owes A. ten sovereigns, A. has a right to bring an action against B. for the money.

The chief forms of right of action that need be considered are shares, stock, debentures, debenture stock, copyright, designs, patents, trademarks, and goodwill.

**§ 17. Shares.**—The proportion of capital subscribed by a member of a company is divided into shares. The allotment of shares in reply to an application constitutes a contract between the company and the member that the latter will contribute the amount of the shares when called upon so to do in accordance with the agreed conditions. A shareholder can never call upon the company to pay him out the amount he contributed. He remains a shareholder until he procures some one else to take his place. A share can always be transferred subject to the company's regulations. The shareholders' names are registered, and usually each shareholder is entitled to a certificate stating the number of shares he holds (§ 11).

**§ 18. Stock.**—The term "stock" is applied to denote either the amount of capital contributed to a company or the amount advanced to a government. Stock differs from shares in that (1) it is always fully paid, and (2) it can be transferred in fractional parts. Sometimes a company, when its shares are fully paid up, converts them into stock for convenience of transfer.

A portion of the national debt is called the funded debt, and the holder of stock in the funds has a right to a perpetual annuity, subject to the right of the State to redeem such annuity by the payment of a stipulated sum. For instance, £100 3 per cent stock is the right to receive a perpetual annuity of £3 per annum, subject to the right of the Government to redeem such annuity by the payment of £100.

The public funds consist of several kinds of stock, the nature and legal incidents of each kind being fixed by the Act of Parliament creating it. The most important stock is known as consols.

Stock in the public funds is transferred by signature of the books at the Bank of England. The owner may attend personally to authorise the transfer, or he may appoint an agent for the purpose, by writing under his hand and seal attested by two witnesses. In some cases stock may be represented by certificates payable to bearer, and then the stock can be transferred by delivery of the certificate.



§ 19. **Debenture.**—The word “debenture” is used in various senses, but as a rule it signifies a document under seal of a company given to secure the repayment of money advanced to the company, such repayment being usually secured by a charge on the whole or part of the property of the company. A debenture may, however, be issued without any such charge. The debenture holder looks to the property charged as the security for his money, and generally stipulates that he will be entitled to certain remedies in case the money is not repaid when due.

§ 20. **Debenture Stock.**—A company is sometimes authorised to issue debenture stock. Such stock is a charge on the undertaking of the company prior to all shares or stock, and the interest has priority over all dividends. Holders of this stock cannot require payment of the principal money paid up upon it. The stock gives, in fact, a perpetual annuity. The holder is a creditor and not a member of the company.

§ 21. **Copyright.**—Copyright is the exclusive right of multiplying copies of an original work or composition. Under the Copyright Acts, copyright in books, pamphlets, sheet music, maps, charts, and plans lasts for forty-two years, *or* during the lifetime of the author, and seven years after his death, whichever period is the longer. The copyright of an article in a review belongs to the author, unless the owner of the review has bought the copyright. An action cannot be maintained for the infringement of copyright unless the copyright has been registered.

§ 22. **Designs.**—Any new or original design applicable to any article of manufacture or to any substance, whether it relate to the pattern, the shape, or the ornament thereof, may be registered at the proper office. By such registration copyright is acquired in the design for five years from the date of registration. A design will not be registered where it has been previously published in the United Kingdom. The design has to be registered for a particular class of goods.

§ 23. **Patents.**—A patent is the exclusive right of making, using, or vending a new invention for a period of fourteen years. The right is conferred by letters patent,

granted under seal by the Crown, but during the period between the acceptance of an application at the patent office and the formal grant, the applicant is protected to the extent that he may use and publish the patent. The applicant has to lodge a general description of the patent when he sends in his application; subsequently he has to lodge a detailed description called the complete specification. The Crown in making the grant does not take upon itself to say whether the invention is new or not. A patentee is therefore liable to find his patent invalid, because some one has previously patented or published the subject matter. A record of all patents is kept at the patent office, and this record can always be searched. The time for which a patent is granted may be extended by the Judicial Committee of the Privy Council where the patentee has not received adequate remuneration.

**§ 24. Trademarks and Goodwill.**—A trademark is a mark applied to goods in order to denote their make or quality, or to indicate the firm who exported or manufactured them. By registering a trademark the right to its exclusive user is acquired. A trademark may consist of a name printed in a distinctive manner, the signature of the applicant, or any distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use.

A trademark can only be assigned along with the goodwill of a business.

A goodwill is nothing more than the expectation that the old customers of a firm will continue their dealings after the business has been transferred to a new firm. The purchaser of a goodwill usually stipulates for his protection that the vendor will not carry on the same business in the neighbourhood. The extent to which such stipulations are valid will be considered in a subsequent chapter (§ 80).

**§ 25. Authorities.**—The treatises on Personal Property by Mr. Williams and by Mr. Goodeve contain a concise account of the various forms of moveable property, as well as chapters on companies. Reference may be also made to Mr. J. W. Smith's *Compendium of Mercantile Law* on the subject matter of this and the following chapters.

## PART II

### CONTRACTS

#### CHAPTER I

##### THE FORMATION OF CONTRACTS

**§ 26. Definition of a Contract.**—A contract is an agreement enforceable by law.

This definition of a contract does not profess to enumerate all the elements that are required to constitute a contract. It merely embodies two of the more important characteristics of every contract, viz. (1) that a contract is an agreement, and (2) that it is an agreement that the law will enforce. It is therefore necessary to examine the nature of an agreement, and to enumerate the various elements an agreement must possess, in order to be regarded as a contract.

**§ 27. What is an Agreement.**—An agreement is an offer or proposal by one person made to and accepted by another person relating to some act to be done or not to be done by one of such persons towards the other.

An agreement therefore implies (a) two persons at least, (b) an offer, and (c) an acceptance.

Two parties at least are required to every agreement, since it is the result of a common intention expressed by two or more minds. Either party may be a natural person, *e.g.* a man or a woman, or an artificial person, *e.g.* a corpora-

tion. The limitations that the law has imposed on the capacity of natural or artificial persons of entering into contracts will be considered later on.

**§ 28. Offer and Acceptance.**—Every agreement, no matter of how complicated a nature, may be resolved into (1) an offer on one side, and (2) an acceptance on the other. The simplest type of case is where A. says to B., "Will you buy 1000 yards of cloth at 6d. per yard?" and B. replies, "Yes." A more complicated case is where a long correspondence takes place between buyer and seller, eventually resulting in goods being sold. But all the stipulations and conditions contained in the letters can be thrown into the form of an offer and an acceptance. An offer may also be made by advertisement, as, for example, where a reward is offered to any person who will restore lost property; the restoration of the property amounts to an acceptance. The time-tables of a railway company form an offer to carry any person, subject to the terms and conditions stated; the purchase of a ticket amounts to an acceptance. A bid at an auction is an offer; the fall of the hammer an acceptance of the highest bid. Many other simple forms of offer and acceptance have been introduced by the custom of trade.

**§ 29. Intention to invite Offers.**—In some cases it is difficult to say whether there is an offer or merely an intimation that offers are or will be invited. For instance :—

A. advertises that he has goods to sell at a certain price. B. goes to his shop and says I will take the goods at the advertised price. Is B.'s statement to be regarded as an acceptance of an offer made by A., or is it to be taken merely as an offer by B. which A. is entitled to refuse? The answer depends in this as in other cases entirely on what was the real intention of the party in advertising, such intention to be collected from the nature of the transaction.

It has been held that the advertisement of a sale by auction does not amount to such a definite offer to sell the goods that there is a contract with those who attend the sale to the effect that the goods will be sold. The courts

regard such an advertisement, if made in good faith, as an intimation of an intention to sell, and not as a binding undertaking to sell. On this principle an advertisement of a sale by tender is merely an invitation of offers, and does not imply that the highest offer will be accepted.

**§ 30. Communication of Offer and Acceptance.**—The parties must communicate to one another their common intention. Unless the offer be communicated, there is no opportunity for acceptance, and a mere intention to accept has no legal effect. If A. offers to sell goods to B., and B. resolves to buy them at the price mentioned, but never communicates his intention to A., there is no agreement for the sale of the goods. The communication of the acceptance may, as we have seen, take the form of the doing of an act. For example, when an order is sent for goods, the offer to purchase implied in the order may be accepted formally, or by the actual sending of the goods.

**§ 31. When is the Communication complete?**—The communication of an acceptance is complete when it is put in course of transmission to the proposer, so as to be out of the power of the acceptor. As a proposer may revoke his proposal before acceptance, it is of great importance to determine the point of time from which an acceptance dates. Where the acceptance is oral no difficulty occurs, but where the acceptance is made by letter or telegram, the question arises, does the acceptance date from the moment of posting the letter or sending the telegram, or from the moment when the letter or telegram is received by the proposer? It has at length been decided that where an offer is made by letter or by telegram, the acceptance is complete the moment the letter of acceptance or the telegram is despatched. Some say that the rule is based on the principle that where A. makes an offer to B. by letter, A. is understood to authorise B. to send an acceptance by post.

The acceptance being complete the moment the letter is posted, it follows that there is a binding contract, though the letter containing the acceptance is never received. The letter may be lost during transmission, but both persons are bound by the contract.

If it is desired to exclude the operation of the rule, the offer should state expressly that the acceptance is not to be binding until the acceptance has been received.

An acceptance may be implied from the conduct of the acceptor. An omnibus company by running its buses offers to carry safely any person who pays the fare. The getting into an omnibus is an acceptance. In the case of an order for goods, the offer as we have seen may be accepted by the sending of the goods.

**§ 32. Nature of the Acceptance.**—The acceptance must be absolute and identical with the terms of the offer.

If there is any variation between the offer and the acceptance, there is no agreement, and the acceptance with its variation is regarded as a new proposal.

A. offered to sell B. a quantity of "good" barley, and B. replied by accepting the offer of the "fine" barley. As it appeared that the words "good" and "fine" were used in the trade to denote different qualities, it was decided that there was no acceptance.

When a broker is employed to sell goods, he is regarded as an agent to act for both buyer and seller. He sends to the seller a "sold note," and to the buyer a "bought note." Both these notes ought to be identical, since if they vary in their terms, *e.g.* as to description of goods, or as to mode of payment, it may be held that there is no contract.

The acceptance of the offer must be by the person to whom the offer is made. A. sent an order for goods to B., who, unknown to A., had sold his business to C. The order was opened by C. and executed by him, but it was held that C. could not recover the price of the goods from A., inasmuch as the original offer had been made to B. and not to C.

**§ 33. Revocation of Offer.**—An offer may be revoked up to the moment of acceptance, but not afterwards.

Until the offer is accepted there is no legal relation between the parties, and therefore the proposer may at any moment revoke his offer. Hence a bidder at an auction may withdraw his bid before the hammer falls. A merchant who has ordered goods by post may withdraw the order provided an acceptance has not been posted.

An offer may be revoked though it expressly allows a certain time for acceptance.

Very frequently a proposal contains a statement that the offer will be kept open until a certain day or a certain hour. For instance, A. writes to B. making him an offer of certain goods, and stating that he will keep the offer open for a certain time. A. is not bound to keep the offer open for such time, since he is under no legal duty to do so. His words are regarded merely as an intimation that after the expiration of the time mentioned the offer will not continue. Hence where three days were given by a merchant to an intending buyer of goods to make up his mind, and within the three days the buyer went to the seller for the purpose of accepting the offer, but before he accepted the offer the seller declined to sell, saying he had offered the goods elsewhere, it was held that this amounted to a revocation, and that there was no contract.

A tender to supply goods during a stated time to a company or institution made in reply to an advertisement, is an offer that may be revoked during the period the time is running. By giving orders from time to time on the terms of the tender, the company or institution convert the tender into a binding contract for all goods actually ordered, but this does not prevent the party tendering from withdrawing as regards any future supply.

**§ 34. Express and Implied Revocations.**—The revocation may be either express or implied.

Express notice may be given by letter or telegram, or orally, and in order to prevent all misunderstanding, it is desirable always to give notice expressly. The form of the notice is immaterial, but it must be given by the proposer or his agent duly authorised.

Implied revocation is a revocation implied from the conduct of the parties. For instance, if A. offers goods to B., but before B. accepts A. sells them to C. If B. has notice or knowledge of such sale he cannot proceed to accept A.'s offer. The sale to C. is regarded as an implied revocation of the offer made to B. But suppose B. has no knowledge of the sale to C., is he at liberty to accept A.'s offer? The

point has not yet been decided, but Mr. Pollock answers in the affirmative. The result would be that A. would have sold the goods twice over, and would have to pay damages to one of the parties if he is unable to fulfil both contracts. It is therefore very desirable that a merchant who has made an offer of goods to one person should not sell them to another until he has withdrawn his first offer.

**§ 35. Communication of Revocation.**—An express revocation, to be effective, must be communicated to the person to whom the offer is made; but in the case of an implied revocation, knowledge of the revocation is sufficient.

A revocation not communicated is altogether inoperative. An intention or determination to revoke an offer is not sufficient. "The law," says Sir W. Anson, "regards the offerer as making his offer during every instant of time that his letter is travelling, and during the period which may be considered as a reasonable time for acceptance." The party to whom the offer is made is therefore entitled to consider that it is still being made, unless he hears to the contrary, and that his acceptance concludes a binding contract. An implied revocation, *i.e.* where the goods offered for sale to A. are sold to B., appears to be only effective if A. has notice of such sale.

**§ 36. From what time Revocation dates.**—The communication of a revocation is not complete until it is received.

We have seen (§ 31) that the communication of an acceptance by post is complete the moment the letter is posted, but in the case of a revocation the communication is not complete until it has actually reached the proposer. A Cardiff firm wrote on the 1st October to a New York firm offering 1000 boxes of tin plates at a certain price, and asked for a reply by cable. On the 8th October the Cardiff firm wrote a letter withdrawing the offer. The first letter containing the offer reached New York on the 11th October, and the New York firm at once cabled accepting the offer. On the 20th October the letter withdrawing the offer was received. The Cardiff firm refused to forward the goods, alleging that they revoked their offer by their



letter of the 11th October; but the court held that the revocation could only date from the 20th October, the date the second letter was received, and inasmuch as the offer had been duly accepted on the 11th, there was a binding contract.

**§ 37. What Agreements are Contracts?**—Assuming the offer not to be revoked, but accepted, there arises an agreement. But an agreement of itself is not enforceable at law. It is therefore necessary to ascertain what agreements the law will enforce. Briefly stated, an agreement to be enforceable must possess three characteristics:—

1. The parties to it must possess legal capacity to enter into the agreement.
  2. The agreement must be made in a certain form or be supported by a consideration.
  3. The subject matter must be lawful.
- These three conditions will now be considered.

## CHAPTER II

### CAPACITY OF PARTIES TO CONTRACT

**§ 38. General Rule.**—Every natural person is competent to enter into a contract who is of full age and of sound mind, and is not specially disqualified by law.

No distinction is now drawn between subjects and aliens as regards capacity to contract, but alien enemies are subject to certain disabilities during war.

The capacity of an artificial person, such as a corporation, to contract depends mainly upon the purpose of its existence, except where it is expressly defined in the instrument or statute creating it.

### INFANTS

**§ 39.**—A person under the age of twenty-one is an “infant.” The position of infants in regard to contracts may be summed up in the following propositions :—

- (a) Contracts made with infants relating to (1) loans of money, (2) sales of goods other than necessities, and (3) accounts stated, are absolutely void.
- (b) Contracts made with infants relating to necessities or for their benefit are valid.
- (c) By custom in certain places and by Act of Parliament, infants may enter into special kinds of contracts.
- (d) All other contracts made with infants may be avoided by them either before or within a reasonable time of their coming of age.

§ 40. (a) **Void Contracts of Infants.**—It follows from the principles above laid down that if a merchant or shop-keeper supplies goods to an infant which are not necessities, or if a money-lender lends him money, or if an account be stated of dealings with the infant, the merchant, the shop-keeper, the money-lender, or the person stating the account, has no remedy against the infant. The infant may pay what is due if he likes, but he is not bound to do so. Even if he represent himself to be of full age, the contract is void. The courts will not, however, allow any person, even an infant, to take advantage of a fraud. And though they must bow to the rule that says the contract is void, they will, on the ground of the fraudulent misrepresentation, compel the infant to restore any benefit he may have derived under the contract.

§ 41. (b) **Contracts of Infants for Necessaries.**—It is an old rule that an infant may enter into a binding contract for the supply of "necessaries" for his own use. "The word 'necessaries,'" said Baron Parke, "is not confined in its strict sense to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, degree, and condition of life in which he is." Food and clothing are examples of necessities, but it would be impossible to give any list, inasmuch as what would be regarded as necessities at one time or to one person, would be held not to be necessities at another time, or to another person. Luxuries and ornaments, such as cigars and jewellery, are not regarded as necessities except under very special circumstances. It is for the judge before whom the case is tried to say whether the articles can reasonably be considered as necessities at all, but if he thinks the question an open one, the jury will be asked to say whether the particular things supplied were, under all the circumstances, to be regarded as necessities. A few examples taken from decided cases will illustrate the above principles.

Livery for a servant, a horse, and a regimental uniform were regarded as necessities where they were specially suitable to the position in life of the infant. On the other hand, a pair of jewelled solitaires that cost £25 were held

not to be necessaries for a young man of large fortune. A watch may be regarded as a necessary, but its price must bear some relation to the circumstances of the purchaser.

§ 42. (c) **Special Contracts of Infants.**—By custom and by statute infants are authorised to enter into special contracts. These contracts relate rather to real property than to mercantile law, but it may be pointed out that, according to the custom of London, an infant unmarried and above the age of fourteen, though under twenty-one, may bind himself apprentice to a freeman of London by indenture with proper covenants.

§ 43. (d) **Voidable Contracts of Infants.**—We have seen that contracts of infants for goods sold, for money lent, and contracts in the form of accounts stated, are void, whilst contracts of infants for necessaries and contracts specially authorised by custom or statute are good. It remains to point out that all other contracts can be enforced by an infant if he chooses, but such contracts cannot be enforced against him. Formerly an infant was allowed, on coming of age, to ratify any contract that he had entered into during infancy, but in 1874 this power was taken away by the Infants Relief Act, which enacted that no action can be brought against a person upon any promise made after he attains his majority, to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy.

### MARRIED WOMEN

§ 44. **Old Rule.**—The old common law regarded a husband and wife as one person, and disqualified the wife from entering into contracts binding on her personally. The custom of the city of London, however, permitted a married woman to trade, and for that purpose to make valid contracts, and by personal service a woman might acquire certain rights, but even in these cases the husband had to be a party to any action brought by or against her.

A married woman divorced or judicially separated from

her husband has the capacity to contract as if she were unmarried. A protecting order from a magistrate confers on her a similar capacity.

**§ 45. Separate Estate.**—At common law the moveable property of a wife belonged to the husband, and he acquired by marriage important interests in her immoveable property such as land. In short, subject to certain limitations, the property of the wife belonged to the husband. In course of time the doctrine came to be established that a married woman might by means of a trustee hold property for her own use independent of the husband. To such property the term "separate estate" was applied. Not only was she allowed to hold such property, but she was allowed to enter into contracts regarding it. Such contracts were regarded as not binding her personally, but as only binding the separate estate. In other words, if she were sued on a contract and judgment was recovered, she could not be committed to prison for refusing to pay. The doctrine of separate estate has been greatly extended by Acts of Parliament, but the principle still remains that the contracts of a married woman bind her separate estate only. The Married Women's Property Act 1882 says: "A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract," and of suing and being sued, as if she were a single woman.

There is a method by which a married woman may be prevented from binding her separate estate, viz. by using in the instrument granting her the property words restricting her from alienation. In such a case she has no power to bind her estate by contract. This disability lasts during marriage, and if she becomes a widow the power to contract revives.

**§ 46. Contracts binding Separate Estate.**—It is essential to the validity of the contract that at the time it is made the married woman should have some separate property, otherwise the contract is void. The value of such property may be very much less than the amount she contracts to pay; that is immaterial as far as the validity of the contract

is concerned. If the contract be valid, it will bind not only the separate estate she possessed at the time the contract was made, but also after acquired separate estate.

On the other hand, if she has no separate estate at the moment of time the contract is made, the contract is void, even though she should acquire such estate afterwards.

**§ 47. As Agent for Husband.**—A married woman residing with her husband has an implied authority to contract on behalf of the husband for a reasonable supply of goods and service for the household. The authority may be revoked at any time, and it is desirable that notice of revocation should be given to those with whom she has been accustomed to deal. The duty of proving that the wife has authority rests with the party seeking to enforce the wife's contract against the husband. The husband being bound in law to maintain his wife, she can, if he fails to support her in a manner suitable to his station, bind him as his agent for what she requires. The husband cannot deprive the wife of this authority. If, however, the wife voluntarily leaves the husband's house and lives apart, she loses all right to pledge his credit, and those supplying her with goods do so at their own risk.

**§ 48. Contracts with Husband.**—A married woman may contract with her husband in respect of her separate estate. She may, for example, lend him money out of such estate. She may also enter into a contract with him relating to any litigation between them, or for a judicial separation. But as regards other kinds of contracts, she cannot as a rule contract with him directly.

## CORPORATIONS AND COMPANIES

**§ 49. Definition.**—A corporation is an artificial person created by law having a perpetual succession, a distinctive name, and a common seal. Not being a natural person, it can only contract through an agent, and such agent must have the requisite authority to enter into the contract.

**§ 50. Powers of Contracting.**—The powers of a cor-

poration to enter into contracts may be defined or limited in the instrument of incorporation. Where this is not the case regard must be had to its constitution and purposes. In the case of limited companies, the powers of contracting are defined in the "memorandum of association." A contract which is beyond the powers of a corporation is said to be *ultra vires* and is void.

**§ 51. Form of Contracting.**—As a general rule, a corporation can bind itself by contract only by a deed, *i.e.* by a writing under the common seal. To this there are many exceptions. Where the matter is of slight importance or of frequent occurrence the seal is not necessary. Hence the agent of a corporation may engage clerks, and the guardians of a poor law union may order ordinary provisions for a workhouse, by word of mouth. Trading corporations may enter into contracts in the usual course of business without the corporate seal (§ 65).

## LUNATICS

**§ 52. Contracts for Necessaries.**—Every person is presumed to be of sound mind until the contrary appear. It may, however, occur that one of the parties to a contract is of unsound mind, and the question arises what effect has this on the contract or on the capacity to contract. By unsound mind is meant incapable of understanding the effects of the contract.

A contract for the supply of necessaries to a lunatic or his wife is good. The debt is chargeable against the lunatic's estate. By necessaries is meant articles necessary to the estate and condition of the lunatic.

**§ 53. Contracts during Lucid Intervals.**—A lunatic differs from an idiot in that he may at times have lucid intervals, *i.e.* be perfectly sane. During such intervals he can enter into a contract. But so long as the insanity lasts the lunatic is regarded as incapable of understanding the nature and consequences of any legal act. Some authorities have thought that if a lunatic enters into a contract, the

fact of the lunacy being known to the other party, the contract is absolutely void, *i.e.* it has no legal effect whatever. But the better opinion seems to be that the lunatic on attaining a lucid interval may either adopt or confirm the contract.

**§ 54. Contracts without Notice of Insanity.**—Where a person contracts with another without any notice of insanity, the contract is valid. Hence where a person of unsound mind bought annuities from an insurance company, and the company had no knowledge of the insanity, it was held after the death of the lunatic that the purchase ought not to be set aside.

**§ 55. Contracts with Notice of Insanity.**—A contract made with a person of unsound mind by a person knowing of such unsoundness of mind is voidable. By “voidable” is meant that if an action be brought against the lunatic to enforce the contract, proof of lunacy will be a good defence.

**§ 56. Effect of Insanity subsequent to a Contract.**—The fact that one of the parties to a contract becomes insane subsequent to the making of the contract, does not as a rule affect its validity. But the insanity of a principal revokes the authority of the agent, and the insanity of a person engaged to be married releases the other from the contract to marry.

**§ 57. Drunkenness.**—A person who by reason of drunkenness has placed himself in a condition analogous to insanity, is regarded, as far as the capacity to contract is concerned, as of unsound mind. The same rules apply as in the case of lunacy. If therefore a person enters into a contract with another, knowing him to be so drunk as not to understand what he is doing, such contract is voidable by the party of whom advantage has been taken.



## CHAPTER III

### THE FORM OF AND CONSIDERATION FOR CONTRACTS

§ 58. **Classes of Contracts.**—An agreement, in order to be enforceable as a contract, must be entered into before a Court of Record, or be under seal, or be supported by a consideration. Hence there are three classes of contracts in English law: (1) contracts of record, (2) contracts under seal, and (3) simple contracts. Certain contracts belonging to the last mentioned class require, in addition to a consideration, that they should be embodied in a certain form, *e.g.* in writing. Simple contracts may therefore be divided into two sub-classes: (1) those requiring, (2) those not requiring a special form.

### CONTRACTS OF RECORD

§ 59. **What is a Record?**—A record is a memorandum of a Court of Record entered on the rolls of the court. Certain entries on the rolls are regarded as amounting to a contract. The record proves itself, and no evidence to the contrary is admitted.

§ 60. **Judgment Debts.**—The only contract of record that requires notice here is a judgment recovered in an action. If one man brings an action for the price of goods and obtains judgment, such judgment is entered on the rolls of the court, and is said to give rise to a debt or contract of record between the plaintiff and defendant. A

judgment debt has now no priority over an ordinary debt in the administration of the assets of a deceased person.

### CONTRACTS UNDER SEAL

**§ 61. How entered into.**—A contract under seal is entered into by the delivery of a written or printed document bearing the seal of the person making delivery. If both parties are to be bound, the document should bear both their seals. It follows that a contract under seal requires three requisites: (1) writing or printing, (2) sealing, and (3) delivery. Signing may be added as a fourth requisite, though there is good reason for saying that, except in certain special contracts, it is not absolutely essential. The document is usually called a deed.

A deed ought to be written or printed on paper or parchment, and not upon wood or cloth, but it is immaterial whether the contents be written or printed, or whether a pen or pencil be used.

**§ 62. Sealing.**—The deed must bear the seal or seals of the party or parties to be bound. The use of sealing wax and of a seal to make an impression on the wax is unnecessary; a wafer or an impression made by an instrument is sufficient.

**§ 63. Signing.**—The signatures of the parties ought always to be added to a deed, but by law they are only absolutely essential in certain cases.

**§ 64. Delivery.**—The “delivery” of the deed makes the deed take effect as regards the party making the delivery. The actual handing over of the deed is the simplest form of delivery, but the use of any words indicating that the person wishes the deed to become operative will amount to delivery.

Usually the seals are affixed beforehand, and the party executes the deed by placing his finger on the seal, saying, “I deliver this as my act and deed.” This amounts to both sealing and delivery. The importance of delivery lies

in the fact that the moment it takes place the deed takes effect.

The delivery may be made conditionally, and then the deed does not take effect until the condition is performed. Until such performance the deed is called an escrow.

If any of the material parts of a deed are omitted and delivery is made, the deed is void and the omissions cannot be subsequently supplied. The document when completed should be re-executed. The omission of an immaterial part, such as the date, will not invalidate a deed.

Shares in limited companies are usually transferable by deed. Sometimes the deed of transfer is executed without the name of the purchaser being inserted. Such a transfer does not pass a legal title to the shares, though it may give a right to have the shares duly transferred. The practice of the Stock Exchange in allowing the purchasing broker to fill in the name of the buyer, is not recognised by the courts.

**§ 65. Contracts that required to be made under Seal.**—In ordinary commercial transactions, such as the selling and buying of goods, it is not necessary to use a deed. But in the following cases the contract must be made under seal :—

1. Contracts transferring shares in companies.

By the Companies Act of 1862, section 22, shares in companies subject to the Act are to be transferred in the manner provided by the regulations of the Company. As a general rule such regulations require a deed for every transfer.

2. A contract transferring a British ship. Merchant Shipping Act, 1854, s. 55.

3. A contract for the sale of a piece of sculpture with copyright. 54 Geo. 3, c. 56.

4. Contracts entered into with corporations. A corporation such as a municipal corporation or a joint stock company is regarded as an "artificial person." In other words, the corporation itself has to be distinguished from the persons composing it. Every corporation has its own special seal, and the presence on a document of an impres-

sion made by such seal is evidence<sup>1</sup> that the corporation was a party to the document. The affixing of the seal makes the document perfect, and delivery is not required, as in the case of deeds made between individuals.

In the case of a trading corporation such as a company it would be very inconvenient to carry out the rule in every case, and it has been established that a *trading* corporation may by its agents and servants enter into simple contracts relating to the objects and purposes for which the corporation was founded. Hence where a gas company orders gas meters, or an iron company iron rails, or a shipping company ship provisions, the contract is good though not made under seal. To require a seal would tend to prevent the company from carrying out the objects for which it was founded. For similar reasons a trading company may draw and accept bills of exchange.

It must, however, be remembered that if the contract does not relate to the purposes for which the company was incorporated, it will not be binding on the company unless the company's seal is attached. For instance, where a company of copper miners gave an order for iron, it was held that this order was so far away from the business of the company that it ought to have been under seal.

In the case of non-trading corporations, such as municipal corporations, the rule requiring all contracts to be under seal is relaxed as regards contracts relating to matters of trifling or of daily occurrence, such as the hiring of a servant, or the ordering of necessities for a workhouse, as well as regards contracts of urgent necessity such as those relating to repairs, necessitated by the severity of the weather or other emergency.

But it is desirable in all contracts of any importance to obtain the seal of the corporation, unless the legislature has expressly exempted such contracts from the necessity of sealing.

<sup>1</sup> Whether a person has sealed a deed or not, is a question of evidence or proof.

## SIMPLE CONTRACTS

**§ 66. A Consideration necessary.**—It is a principle of English law that an agreement, if it does not amount to a contract of record or a contract under seal, must, in order to be enforced, be supported by some consideration. As mercantile contracts are seldom made under seal, it may be laid down as a general rule that all mercantile agreements, in order to be binding, must be supported by a consideration. Special statutes require in addition certain contracts to be in writing, so that a distinction may be drawn between (1) contracts that require both writing and consideration, and (2) contracts that require a consideration only.

**§ 67. Contracts required to be in Writing.**—The following are the chief examples of contracts relating to mercantile transactions that are required to be in writing:—

1. The acceptance of a bill of exchange.
2. The acknowledgment of a debt otherwise barred by the statute of limitation. A creditor cannot recover a simple debt after six years have elapsed, unless the debtor before the expiration of such six years makes a payment on account or gives an acknowledgment that he owes the money. Such acknowledgment must be in writing and be signed by the debtor or his agent.
3. Any promise made by one person (A.) to another person (B.) to answer for the debt, default, or miscarriage of a third person (C.) For instance, where A. promises B. that if he (B.) will supply goods to C., he (A.) will be answerable for the price of the goods if C. does not pay, B. should not supply the goods unless the promise is reduced to writing. It will be observed that it is assumed that the third person (C.) obtains the goods on credit, he is therefore primarily liable to pay. A. undertakes to be liable in case C. does not fulfil his promise. In all such cases the rule applies, and the promise should be given in writing, and be signed by the promiser or his agent

authorised for that purpose. If no writing be given, and C. fails to pay for the goods, no action can be brought against A.

4. Any agreement not to be performed within the space of one year from the making thereof.

This rule is applied only to agreements that clearly show by their tenor that the parties contemplated performance after the expiration of one year. For instance, a contract of partnership for ten years, a sale of goods where the goods are not to be delivered or paid for until after the expiration of twelve months, a contract of service for three years — such contracts indicate the intention of the parties to postpone performance for one year.

But if the contract is so framed that no such intention is indicated, and it is one that may be performed within the year, or if it may be performed within the year by one of the parties, then it is not within the rule: for instance, a contract to deliver goods within six months, and to receive payment within eighteen months, or a contract for the sale of goods, the price to be paid by yearly instalments.

5. Contracts for the sale of goods of £10 in value or over, where there is no acceptance of the whole or part of the goods, and no payment or part payment of the price.

Inasmuch as wholesale transactions are usually for goods of a greater value than £10, and are entered into without an immediate tender of the goods or the price, this class of contracts will embrace the greater number of wholesale purchases and sales. The above rule is based on the 17th section of the Statute of Frauds and on Lord Tenterden's Act (9 Geo. 4, c. 14, § 7), which enact that in order that a sale of goods of the value of £10 and upwards shall be binding, one of three things must occur, viz. (1) acceptance of the whole or part of the goods, or (2) receipt of part of the price, or (3) writing signed by the party liable.

The rule will be fully discussed in the chapter dealing with the contract of sale.

**§ 68. Oral Contracts.**—We now pass to those contracts

that need not be expressed in any particular form, that is to say, contracts that may be entered into by word of mouth. The class is a very important one. It includes all sales where the value of the article sold does not amount to £10, and as most single retail transactions relate to goods under £10 value, it will be understood that an enormous number of these contracts are entered into during the course of the year.

As a matter of fact, oral contracts for the sale and purchase of goods of a greater value than £10 are daily entered into. In strict law such contracts are not binding, but the force of commercial opinion ensures their due observance. If it became known on any exchange that a particular merchant was in the habit, when convenient, of disregarding his contracts on the ground that they ought to have been put in writing, no one would enter into business relations with him.

Reference has already been made to the fact that a contract in writing (as distinguished from a contract under seal) requires what in law is called a consideration. The same principle applies to oral contracts. We may therefore lay down the following rule: Every contract, whether written or oral, not being made under seal, requires a consideration.

**§ 69. What is a Consideration?**—The simplest example of a consideration is money. A. buys goods from B. at a price of £20. The £20 is the consideration promised by A. to B. for the goods. But the goods themselves may be regarded as the "consideration" given to A. by B. in exchange for the money. The consideration then is the equivalent or return given for a promise.

But a consideration need not necessarily be money or goods; it may be some service or task. For instance, if a carrier undertakes to carry your luggage for a certain sum, the carrying of the luggage is a sufficient consideration to give rise to a valid contract.

The consideration may also be an omission to do that which a person is entitled to do. For instance, A. may be entitled to sue B. for a debt, A. may agree not to sue for a time provided an extra £5 be paid down; here the consideration given by B. is £5, the consideration given by A. the giving of time for payment.

Marriage is a valid consideration between the parties to a marriage, and will support a promise made to either or both of such parties by a third party. On the other hand, blood relationship or love or affection is not sufficient to support an ordinary contract.

A consideration then is a *quid pro quo*; and it is the legal term used to denote the "something" that every person must give in order to obtain "something" in return.

**§ 70. Executed, Executory, and Past Considerations.**

—When a consideration is an act to be done, such as the payment of money, and the money is paid at the time the contract is entered into, the consideration is said to be "executed"; but if the money be not so paid, the consideration is said to be "executory." A "past" consideration is one executed and past before the contract is made. We shall see later on that an "executed" or an "executory" consideration is, but a "past" consideration is not, sufficient to support a simple contract.

**§ 71. Rules relating to Consideration.**—(a) The amount of the consideration given is immaterial so long as it is of some value.

The law leaves the parties to make their own bargain. It insists that there shall be some price, but leaves the price to be fixed by agreement. If therefore a merchant in want of money sells his goods at a very low price, he cannot afterwards upset the sale on account of the small price he received. It is only when the inadequacy of the consideration is so gross as to amount to fraud that a court will interfere to set aside the contract (§ 90).

(b) A promise to do that which a man is bound to do will not amount to a consideration.

A promise by A. to B. to do that which he (A.) is already legally bound to do is of no advantage to B., because B. knows that the act must be performed in any case. It will not therefore be a good consideration for something promised on the part of B. The asking of time for payment of a debt is a good example of this type of case. A creditor is pressing a debtor for payment, and is threatening legal proceedings. The debtor asks for a fortnight's



delay, and the creditor grants it, but before the fortnight expires he issues a writ. The debtor cannot legally complain. If he sets up as a defence the promise by the creditor to give further time, the answer will be that as the debtor was legally bound to pay at once, he gave nothing in return for the promise to wait, and therefore the promise of the creditor was not binding. On the other hand, if the debtor had given something for the extra time, then there would have been a valid contract.

(c) The consideration must not be so vague that it would be impossible for a court to enforce it.

(d) The consideration must be lawful.

The promise to do an unlawful act will not be a good consideration. And if any part of the consideration is illegal, it generally renders the whole transaction illegal (§ 75).

(e) The consideration must not be a past benefit.

This rule may be best explained by an illustration. A. purchased a horse from B. At a subsequent time A. inquired if the horse was sound, and B. thereupon gave A. a warranty of soundness. In other words, B. entered into a contract with A. to the effect that he warranted the soundness of the horse. Such a warranty was not binding, inasmuch as A. gave B. nothing—no consideration for it. Had the warranty been given at the time of the sale it would have been binding as part of the transaction.

**§ 72. Waiver of Exemption from Liability.**—A debtor, as we have seen, is not bound to pay a debt after six years have expired. The debtor may, however, waive his right, and if he promises to pay the debt after the six years have expired, he will be bound by his promise. Some writers think this promise is to be regarded as based on a consideration already received.

**§ 73. Proof of Consideration.**—The plaintiff who is trying to enforce a simple contract must show that he gave some consideration to the defendant in respect of the defendant's promise. The holder of a bill of exchange is not bound by this rule. If he is suing another party on the bill, the burden of showing that no consideration was given lies on the defendant.

## CHAPTER IV

### THE LEGALITY OF THE AGREEMENT

**§ 74. Introductory.**—We have seen that an agreement, to be enforced as a contract, must not be unlawful. The question then arises, What agreements are unlawful? In answering this question no attempt will be made to enumerate all the various kinds of unlawful agreements, as it will be sufficient for the purposes of this work if attention be directed to the leading unlawful agreements relating to trade.

**§ 75. Where the Object is Unlawful.**—An agreement for an unlawful purpose is void. An unlawful purpose is one that is prohibited by law. It is unlawful, for instance, to sell goods to be shipped in a prohibited trade, or to sell beer to be retailed without a license. In all such cases the seller, if not voluntarily paid for the goods, cannot recover the price. Upon the same principle money lent for an illegal purpose cannot be recovered.

**§ 76. Where an Insurer has no Interest in the Policy.**—An insurance of a ship where the insurer has no interest in the ship is void. The object of this rule is to prevent insurances being entered into by way of wager.

The same principle is applied to life and fire insurance. A man may insure his own life, but he cannot insure the life of another unless he has an "interest" in such life at the time of effecting the insurance; and only a person who has an interest in property can insure it against loss by fire (§ 164).

**§ 77. Where Goods are sold on Sunday.**—By a statute

passed in the reign of King Charles II., tradesmen are prohibited under a penalty from exercising any business on Sunday. An action cannot be brought upon an agreement made in violation of the statute, and hence where a horse-dealer bought a horse with a warranty on Sunday, he could not sue for breach of warranty (§ 147). In order that the statute may apply, the agreement must be one made in the course of the ordinary business of the tradesman. If, however, goods be sold on Sunday, and both parties carry out the agreement, the property in the goods will pass to the buyer.

**§ 78. Where Goods are sold by Improper Weights or Measures.**—By the Weights and Measures Act of 1878 all agreements for work or goods agreed for by weight or measure are, in the absence of any agreement to the contrary, to be regarded as made with reference to the imperial weights and measures, and if not so made, they are to be void. But the weights and measures of the metric system may be used in agreements.

**§ 79. Where certain Goods are not sold in accordance with Law.**—Dead game killed in this country can be sold only during a certain time of the year by licensed dealers.

Intoxicating liquors can be sold only in licensed premises. The retailer of spirituous liquors is prohibited from taking any pledge for the payment of the price, and as a rule the retailer of all kinds of intoxicants is unable to sue for the price.

Coal must be sold by the weight, and a weight ticket be delivered to the buyer with any quantity over two hundredweight; otherwise a penalty is incurred, and the seller cannot recover the price. Bread, except fancy bread, must also be sold by weight if the purchaser so desire.

**§ 80. Where the Agreement is in restraint of Trade.**—As a general principle a trader is entitled to carry on a lawful business at his own discretion and in his own way, and any agreement to the contrary is void. Hence where a number of manufacturers agreed to regulate the wages and hours of work of their employees, and to manage their

establishments in accordance with the views of the majority, it was held that this agreement, being in restraint of trade in so far as it deprived each one from controlling his own business, was not enforceable.

It is, however, not unlawful for a number of trades to agree to share the trade between them in such a way as to prevent competition, at least so long as there are no unreasonable restraints placed upon the parties.

The law permits agreements to be entered into that appear to be in a partial restraint of trade, on the ground that ultimately trade will be benefited. The chief agreements of this kind relate to the sale of a business.

After the sale of the goodwill of a business the seller, in the absence of any contract to the contrary, is free to carry on a similar trade, and to solicit his former customers in the usual way of business. In order to prevent the seller taking this course, it is usual to insert in the document by which the sale is effected a stipulation or contract restraining the seller from trading within such limits as regards place and time as are reasonably necessary for the protection of the business the buyer has acquired.

A restraint unlimited as regards space is generally held to be unreasonable. For example, a covenant by a brewer not to carry on the business of a brewer elsewhere was held unreasonable. On the other hand, covenants by a milkman not to set up in business within five miles for two years, and of a butcher not to carry on the same trade within five miles, were held reasonable. The custom of the trade is an important element in determining what is reasonable.

A restraint reasonably limited as to space may, in some cases, be unlimited as to time, inasmuch as this may be necessary to secure him the full enjoyment of that which he has bought. Hence the seller may agree not to carry on a similar business during his life.

The agreement must be founded on a valuable consideration, but the amount of the consideration is immaterial.

Similar principles are applied to agreements by which a retiring partner binds himself not to compete with the firm,

or by which a servant or agent undertakes not to compete with his employer after the period of employment has ended.

**§ 81. Where the Agreement is a Fraud on Creditors.**—All agreements made for the purpose of defrauding third parties are void. If therefore a debtor who is insolvent enters into an arrangement with his creditors that they will accept part payment of all debts due in full discharge of such debts, he is not allowed to favour one creditor at the expense of the others. A creditor who stipulates with the debtor for a preference in favour of himself cannot enforce such agreement.

**§ 82. When the Agreement is in Fraud of the Bankrupt Laws.**—Any agreement on the part of the creditors of a bankrupt, or of the bankrupt himself, tending to interfere with the just application of the bankrupt law is illegal and void. An agreement by a creditor not to oppose the bankrupt's discharge, or an agreement interfering with the equal distribution of the assets, is void. So too is an agreement buying the vote of a creditor in the interests of the bankrupt.

## CHAPTER V

### POSSIBILITY OF PERFORMANCE

§ 83. **Possibility at Time of Contracting.**—An agreement, in order to be enforceable at law, must be possible of performance. As we are at present concerned with the formation of contracts, the possibility of performance to be considered is that which exists at the time the agreement is made. If such possibility exist then there is *prima facie* a good contract.

At a subsequent time events may occur that render it impossible for one or other of the parties to fulfil the obligation undertaken, and the effect of such events on the legal position of the parties requires to be examined.

§ 84. **Kinds of Impossibility.**—Three kinds of impossibility may be specified :—

1. Absolute impossibility : that is to say, impossibility inherent in the nature of the act promised, as, for instance, where a man agrees with another to make water run up a hill, or undertakes to fly across the ocean.
2. Legal impossibility : that is to say, where the act promised is prohibited by law.
3. Actual impossibility : that is to say, where the act promised becomes impossible owing to circumstances.

§ 85. **Absolute Impossibility.**—If an agreement is impossible in itself, it is void, as the parties to it cannot be supposed to have entered into an absurd agreement. The question of what is or is not impossible in itself depends

largely on the progress of knowledge. What is apparently impossible at one time, becomes possible at a later stage of the earth's history.

**§ 86. Legal Impossibility.**—Where the performance of an agreement is legally impossible there is no valid contract. Every person is supposed to know the law, and the parties to the agreement are taken to have been aware that in law it could not be carried out. For instance, if A. professes to discharge B. from a debt due to C. without having any authority from C. to do so, the discharge is void, as a valid discharge for a debt can be given only by the debtor or his agent.

**§ 87. Actual Impossibility.**—Where the act to be done is not impossible in itself, and is not prohibited by law, it may become impossible in fact, owing to particular circumstances occurring subsequently. As a general rule the agreement is valid and the party who has undertaken the performance is liable. A few examples will illustrate the principle. Where a ship was to be loaded with usual despatch, and the loading was delayed by the occurrence of a frost, the party loading was held liable for the delay. Where a builder undertook to erect a building within a certain time in accordance with plans to be furnished, and it turned out that the plans were such that the buildings could not be erected within the time prescribed, the builder was held liable. In both these cases the parties might have protected themselves by the insertion of proper stipulations in the agreement. Unexpected difficulties therefore do not serve as an excuse for non-performance of the terms of an agreement.

There are certain exceptions to the principle, but they will be referred to under the head of Performance and Discharge of Agreements (§ 102).

## CHAPTER VI

### EFFECTS OF MISTAKE, MISREPRESENTATION, OR FRAUD

§ 88. **Reality of Consent.**—A contract which on the face of it is for a legal and possible object, possesses the proper form or consideration, and is made between parties capable of contracting, may, however, have no legal effect or a limited legal effect if it appear that there was no real agreement. This may happen in three ways: (1) where there was a “mistake,” the parties meaning different things; (2) where there was “misrepresentation,” by one of the parties that induced the other to contract; and (3) where there was “fraud,” *i.e.* an intentional misrepresentation.

§ 89. **Mistake.**—As a general rule one party to a contract is not allowed to avoid it by alleging that he made a “mistake.” The word “mistake” may, however, be used in various senses. It may mean a mistake as to expectations. A. buys goods thinking the market is going to rise, when in fact it falls. It may mean a mistake as to the utility of the article for a particular purpose, as, for instance, where a person buys a stove which he finds too small for heating purposes. Or it may mean mistake in wording the offer or the acceptance, *e.g.* where A. orders 100 tons when he only meant 10 tons. Other uses of the word might easily be given. We are, however, concerned with a technical use of the term to denote certain circumstances that are recognised by the courts as indicating a want of that real consent that is essential to every contract. These circumstances may be divided into five classes:—



1. Where the contract relates to a thing believed by both parties to exist when it has ceased to exist.
2. Where one party contracts with another person believing him to be a third party.
3. Where one party, not being negligent, is mistaken as to the real nature of the contract.
4. Where there is a mutual mistake as to the identity of the thing sold.
5. Where one party is mistaken as to the nature of the promise given, and such mistake is known to the other party.

§ 90. (1) **Mistake as to the Existence of the Subject Matter.**—When a cargo at sea is sold, the parties not knowing whether it is afloat or not, are regarded as contracting on the supposition that the cargo is afloat. If it eventually turns out that the vessel and cargo had been wrecked and lost at the moment the contract was made, the contract is not binding, and the loss will fall on the seller and not upon the buyer. So too where a cargo of corn supposed to be on a voyage to England was sold, when in fact it had become so heated that it had already been sold at Tunis, the court held the contract void on the ground that it implied that the corn was in existence as such, and that it was capable of delivery.

It would probably be more correct to classify all these cases under failure of an implied condition that the thing sold is in existence, and belongs to the vendor.

It is important to remember that such an implied condition is only imported into contracts of a certain type, *i.e.* when the parties are to be taken as contemplating an existing thing belonging to the vendor. There is no rule of law to prohibit A. from selling to B. that which does not belong to A. Stock Exchange dealings take place daily in stocks and shares that do not belong to the vendor, and such dealings are valid. Non-existing property may be bought and sold if there is a possibility of its existence, and the parties are aware of its non-existence. For example, A. may sell B. a crop to be raised on a certain field.

§ 91. (2) **Mistake as to Party.**—The usual type of case

in which one party contracts with another believing him to be a third party, is due as a rule to the fraud or dishonesty of the other party. A. was accustomed to buy goods from B.: an order for goods from A. directed to B. came into C.'s hands, who had bought B.'s business. C. executed the order without informing A. of the change in the proprietorship of the business. It was held that A. was not obliged to pay for the goods, as there was no contract between A. and C.

If A. by imitating the signature of B. obtains goods from C., the property in the goods will not pass to A., as there is no real contract of sale between A. and C. In this case C. thinks he is contracting with B.

**§ 92. (3) Mistake as to the Nature of the Contract.**—Where a blind man or a man who cannot read has a written contract falsely read out to him, so that the contract as read is entirely different from the contract as written, and afterwards signs the contract, it will not be binding on him. Under such circumstances "the mind of the signer did not accompany the signature." Hence where a very old man signed a bill of exchange (§ 238), being told that it was a guarantee (§ 188), and the bill was endorsed over to a party who sued him upon it, it was held that the amount could not be recovered against him. And where an illiterate man executed a deed releasing "all claims," which was represented to him as a deed releasing "arrear of rent" only, it was held that the deed was void.

In order that the contract may be avoided in these cases, it is necessary that there should be an absence of negligence. He who signs a written document without informing himself of the contents when he is able so to do, is negligent, and will be bound by his document.

**§ 93. (4) Mistake as to the Identity of the Thing sold.**—If A. intends to sell one thing, and B. to buy another, there is an absence of that common intention that is the essence of every agreement. Cases occur where different things are described by the same name, and it is quite possible for the parties to agree upon a contract thinking they mean the same subject matter when in fact they do not. A. purchased from B. a cargo of cotton "to arrive

*ex* 'Peerless' from Bombay": it so happened that there were two ships sailing from Bombay named 'Peerless,' and A. meant one vessel and B. the other. It was held that there was no contract.

**§ 94. (5) Mistake of One Party known to the Other.—**

In all contracts of sale the law as a rule leaves the buyer to use his own judgment, and if he makes any mistake as to the quality of the thing sold, the loss falls upon himself (§ 146). To this rule there are, as we shall see (§ 147), certain exceptions; for example, where the vendor is regarded as warranting the quality of the thing sold. If therefore A. buys from B. a length of cloth believing it to be of better quality than it really is, B. making no representations on the subject, and A. not communicating his views to B., the contract is good. But if A. buys the cloth thinking it is made entirely of silk, when it is made of a mixture of silk and cotton, and B. knows that A. thinks that he (B.) is selling the cloth as pure silk, the sale is void. Of course A. might protect himself by asking B. to warrant the cloth to be pure silk, but we are assuming that there is no warranty asked for or given. It is also assumed that B. makes no representation of any kind; he is merely supposed to know that A. thinks that he (B.) is selling pure silk. The following example may also be given: A. bought some oats from B.; the oats were new, but A. thought they were old, and B. knew that A. thought that he (B.) was selling old oats; it was held that the sale was void.

**§ 95. Misrepresentation.—**Previous to or at the time of entering into a contract representations may be made by either party to the other with the object of inducing him to agree to the terms proposed. A vendor of goods, for instance, may represent them as being the manufacture of a particular firm, or as possessing certain qualities. Another type of representation may be seen in the statements contained in the prospectus of a company inviting the public to take shares. Closely connected with misrepresentations is the non-disclosure of facts known to one party and not to the other. In certain contracts, such as insurance (§ 163), the fullest disclosure of all material facts is required, but

apart from these contracts one party is not bound to disclose to the other facts that he knows, and which might affect the other party's judgment. For instance, a seller of goods is not obliged to point out defects to the purchaser. Actual misrepresentation is forbidden, and a contract is liable to be set aside where a misrepresentation is made, even though the person making it believes he is speaking the truth. In order that a misrepresentation may avoid the contract, it must be (1) of fact and not of law, (2) made by a party to the contract, and (3) the misrepresentation must have induced the contract acted on the misrepresentation.

1. The misrepresentation must be of fact.

Every one is supposed to know the law, and therefore the courts will not avoid a contract where one party entered into it on the faith of a representation of its legal effects which was untrue. There are exceptions to this rule, as, for example, where such an advantage has been taken by one party of the other as to amount to a fraud.

The representation must not be a mere opinion — an opinion is not a fact. Hence statements of "belief" are not representations of fact.

2. The misrepresentation must be made by a party to the contract.

If A. contracts with B. on the faith of representations made by C., he cannot avoid the contract. But if B. is the agent of C., the question arises, Are principals responsible for the misrepresentations of their agents? As a rule a principal is only liable for the act of his agent if it is within the scope of his authority (§ 128), and hence if the misrepresentation was within the agent's authority, the contract of the principal is void. Directors are agents of the company, and if they induce persons to contract with the company by misrepresentations, such contracts are liable to be avoided.

3. The misrepresentation must have induced the contract.

A party to a contract cannot avoid a contract on the ground of misrepresentation, if such misrepresentation did not induce him to make the contract. The misrepresenta-

tion, in other words, must relate to a material fact; and a fact is said to be material when it would affect the judgment of a reasonable man, acting on the principles which men follow in the kind of business to which the contract relates. It is no reply to an alleged misrepresentation to say that the other party might have ascertained the truth—the making of the representation tends to put the other party off his guard. Nor is it any reply to prove that the party making it believed in its truth. There is no duty, in the cases of which we are speaking, of making any representations whatever, and he who makes them and thereby induces a party to enter into a contract with him cannot enforce such contract.

§ 96. **Fraud.** — A misrepresentation will amount to fraud where the party making it (1) knows that it is untrue, or (2) makes it recklessly, not caring whether it be true or false.

That knowledge of the falsehood of the thing asserted is necessary to fraud, has always been recognised. But the circumstances under which false statements made without such knowledge amount to fraud, have been the subject of much discussion. It is not sufficient that the false statement be made carelessly, it must be made recklessly. An honest belief in the truth of the statement excludes the idea of fraud.

For example, where the directors of a company stated in a prospectus that the company had the right to use steam power, honestly believing this to be true, when in fact the company had no such power, it was held that there was no fraud.

Whether a false statement is made recklessly or whether there are reasonable grounds for believing it to be true is a matter of evidence. Careful inquiry is made into the circumstances under which the statement was made, or upon which the belief was founded. A man may deliberately represent himself as having a belief which he does not possess. This will amount to fraud; the person is wilfully misrepresenting his state of mind, which is a matter of fact.

The distinction between misrepresentation and fraud lies in this, that in fraud there is a wilful misrepresentation. Fraud involves misrepresentation, but requires in addition either a knowledge that the statement is untrue, or a reckless state of mind as to its truth or falsehood.

**§ 97. Remedies in case of Misrepresentation or Fraud.**

1. Contracts induced by misrepresentation or fraud are not void but voidable, *i.e.* the party injured may elect to uphold the contract or to avoid it.

If he upholds the contract, he may claim damages for such loss as he has sustained. If he desires to avoid the contract, he must give notice of such intention to the other side. He cannot, however, take this course if he has taken any benefit under the contract, or if circumstances have so altered that the parties cannot be placed in their original position, or if third parties have acquired rights under it.

2. In the case of fraud an action may be brought for deceit.

Fraud is a wrong giving rise to an action for damages, apart from any damages that can be claimed for any loss arising under the contract.

## CHAPTER VII

### THE ASSIGNMENT OF CONTRACTS

§ 98. **Introductory.**—An unperformed contract gives rise to certain rights and duties. The rights belong to, and the duties are binding on the parties to the contract. A person who is not a party to the contract cannot enforce the rights or be compelled to undertake the duties. It may, however, happen that one of the parties may desire to transfer his rights or his liabilities to another person, and we have to examine how far the law will recognise such transfer. A distinction must be drawn between rights and duties or liabilities.

§ 99. **Liabilities cannot be assigned.**—The law does not permit a person who has promised to do anything under a contract to transfer such duty to another person. If A. contracts with B. that he, B., shall manufacture and supply certain goods, B. is not allowed to transfer the duty of fulfilling the contract to C. A. may have been induced to make the contract by his reliance on the credit and character of B.: in any case the law assumes that A. contracted with B., and with B. alone.

A liability, however, may be assigned with the consent of the party entitled to call for performance. This practically amounts to a rescission of the contract with one person and the making of a new contract with another.

§ 100. **Assignment of Rights.**—Formerly it was a rule that rights under a contract were not assignable, but partly by the decisions of the courts and partly through the

operation of statutes, such rights can now be assigned. Special provision has been made for assigning rights under certain contracts, *e.g.* in the case of policies of insurance and shares in companies. In all these cases the provisions of the statute must be observed.

The right to receive money under a bill of exchange or a promissory note may be transferred by delivery of the bill or note if it is payable to bearer, and by endorsement and delivery if it is payable to order (§ 246). No notice is required to be given to the party liable to pay; it is not necessary for the assignee to show that he gave any consideration; and he is not affected by any defect in the title of prior holders. These characteristics are summed up in the word "negotiable." A bank-note is an example of a negotiable instrument. It can be transferred by delivery, the transferee has not to give notice to the bank that it has come into his hands, and he is entitled to receive gold in exchange for it from the bank named, though some previous holder may have stolen it.

All debts, *i.e.* rights to receive money, may be assigned in writing signed by the assignor, provided the assignment be absolute. The assignee must give notice of the assignment to the person liable to pay, whose consent, however, is not necessary. The assignee takes subject to any "equities," *i.e.* claims to which the debt was subject previous to assignment.

**§ 101. Assignment of Rights and Liabilities by Operation of Law.** — We have seen that a liability under a contract cannot be assigned to another by the party upon whom the liability is cast by the contract. What an individual cannot do, the law may do, and in some cases does it. For instance, the purchaser of a lease is by law bound to pay the rent and to discharge other liabilities imposed by the lease on the original lessee. If a husband receives property through his wife, he is liable to the debts contracted by her before marriage to the extent of such property. Death often operates as a transfer of both rights and liabilities. For instance, the legal representatives of a deceased man take all his personal property; all liabilities



attached to such property pass to them as well as the benefit of all rights of action. On bankruptcy all rights of action belonging to the bankrupt pass to the trustee, though as far as liabilities are concerned the trustee can in some cases disclaim them.

## CHAPTER VIII

### PERFORMANCE, BREACH, AND DISCHARGE OF CONTRACTS

**§ 102. Duty of Performance.**—The parties to a contract are bound to carry out their respective promises. If the contract be silent as to the mode of performance, it must be performed in accordance with the usage of the place where it was made. In all cases the performance must be a *bona-fide* performance, and not a compliance with the mere letter of the agreement. Where no time is fixed, performance must be within a reasonable time. In some cases the performance by one party is made to depend on something to be done previously by the other; where this happens, performance is not due until the act agreed upon has been performed.

**§ 103. Payment.**—When a sum of money has to be paid, the payment, unless the parties otherwise agree, should be made in legal-tender money (§ 154). A bill or note is often taken in payment of a debt, but as a rule this is to be regarded as merely extending the time for payment, so that if the money be not paid when the bill or note is due, the creditor may still sue on the original contract. But if the creditor has taken the bill or note in discharge of the debt, then he has to rely on the rights of action given by the bill, and the original contract is at end.

**§ 104. Tender.**—In the case of a sale of goods, a tender of the price or of the goods amounts to performance on the part of the person tendering. In the case of a tender of goods, the tender should be unconditional, and

be made at the proper time and place, and the person to whom the tender is made should have a reasonable opportunity of examining the goods.

In the case of money, such a sum should be offered as will enable the creditor to take exactly what is due without giving change (§ 154).

### BREACH OF CONTRACT

**§ 105. Effect of Breach.**—A breach of contract by one party gives the other party a right of action for damages, and, in the following cases, discharges such other party from the necessity of performing his share of the agreement: (1) when the party renounces his liabilities; (2) when he makes it impossible that he can fulfil the contract; and (3) when he totally fails to perform what he has promised.

**§ 106. (1) Renunciation.**—Where one party gives the other notice that he will not carry out a contract, the latter may treat the contract as at an end, and bring an action for damages. For instance, if A. engage B. as a servant from the 1st June, and before the 1st of June A. writes to B. that he will not require his services, B. may bring an action for damages at once against A. In order that a renunciation should amount to a discharge of a contract, it is necessary (1) that the renunciation should be of the whole contract, and (2) that the renunciation should be treated as a discharge. If subsequent to renunciation performance is insisted on, the contract remains.

**§ 107. (2) Impossibility.**—If one of the parties to a contract by his own act renders it impossible for him to perform it, the other party is excused performance, and may at once bring an action for damages. For example, if A. gives B. an option (which B. accepts) to purchase an article within a certain time, but before the option is exercised sells it to some one else, the contract is at an end (§ 87).

**§ 108. (3) Failure to Perform.**—Where the performance of a promise forms the consideration for the perform-

ance of another promise, failure to perform the one excuses the performance of the other. As for example, where A. buys goods and promises to pay for them on delivery, here delivery must be made before payment can be demanded. But if the promise and not the performance of it was the real consideration on either side, the contract must be performed on one side though it be broken on the other, the injured party having his remedy in an action for damages. As for example, where A. bought land from B. and covenanted to pay for it on the 1st April, and B. covenanted to convey the land to A., no time being fixed for the conveyance: as soon as the 1st April arrived, B. was entitled to sue for the purchase money though he had not conveyed nor offered to convey the land to A.

**§ 109. Remedies for Breach.**—We have seen that in many cases of breach of contract the party injured is discharged from performance of his promise. Apart from this, he is entitled to bring an action for damages. The amount of damages recovered is supposed to represent the loss sustained so far as it was in contemplation of the parties. Where the parties cannot agree on the amount, it has to be fixed by a judge or a jury.

Instead of awarding damages, the courts might order the defaulting party to perform the contract. This course is usually adopted in regard to sales of land, but in the case of the sale of goods the courts consider that damages are a more appropriate remedy: and specific performance is only decreed when the articles sold cannot on account of their intrinsic qualities be represented adequately by damages.

### DISCHARGE

**§ 110. Discharge of Contracts.**—A contract may be discharged or rescinded in the following ways:—

1. By consent. The parties may agree before performance that the contract shall be no longer binding. If the contract has been under seal, the discharge must also be under seal. The discharge may take

the form of the substitution of a new contract for the old one.

2. By fulfilment of a proviso for discharge. The original agreement may contain a clause to the effect that under certain circumstances it is to be at an end.
3. By operation of law. The alteration of a written contract will under certain circumstances operate as a discharge; and when a bankrupt obtains his order of discharge, he is discharged from all debts provable under the bankruptcy.
4. Performance, as we have seen, puts an end to the contract.
5. Breach of contract, as we have also seen, often operates as a discharge.

**§ 111. Authorities on Contracts.**—The work of Sir William Anson on the Law of Contract will be found very useful by the student. Sir F. Pollock's treatise on Contracts is more advanced. A Digest of the Law of Contract is published by Mr. Leake; whilst works such as Addison on Contract discuss all forms of contracts.

## PART III

### THE LEADING COMMERCIAL CONTRACTS

#### CHAPTER I

##### PARTNERSHIP

§ 112. **Its Nature.**—Partnership has already been defined as the relation that subsists between persons carrying on a business with a view to profit. The partners may make any agreement they please as to the amount of capital, labour, or skill that each one is to contribute to the business, but the sharing of the profits is absolutely essential to a partnership. If an agreement, for instance, be made that one of the partners is to have no share in the profits, he is not a partner. The mere receipt of a share of the profits will not of itself be conclusive as to the existence of a partnership. The executors of a partner may, after his death, be entitled to a share of the profits, but the receipt of such share will not necessarily make the executors partners. Sharing profits is, however, evidence of partnership, but it is not conclusive—all the facts of the case must be examined and the real intention of the parties ascertained. A widow or child of a deceased partner may receive by way of annuity a portion of the profits without becoming thereby a partner. Interest to a creditor may vary with the profits, or take the form of a share of the profits without the lender becoming thereby a partner.

But parties are not permitted to exercise the powers of a partner and at the same time under the cover of some arrangement escape the liabilities of a partner. A creditor who lends money in consideration of a share in the profits is obliged, in case the borrower becomes bankrupt, to postpone his claims until all the other creditors are paid. But if his debt is secured by any charge or mortgage, his rights under such charge or mortgage remain unaffected.

**§ 113. Power of a Partner to bind the Firm.**—Every partner is an agent of the firm and of his other partners for the purposes of the partnership. As between the partners and third parties, each partner is taken to have full authority without any express agreement to enter into contracts binding on himself and his co-partners, so long as such contracts relate to the usual and ordinary business of the partnership. He may therefore sell any goods belonging to the firm, buy any goods required for the business, engage clerks, and receive all debts due. The exact limits of a partner's authority naturally depend on the character of the business of the firm. Where the firm is carrying on some trade, a partner, as a rule, has in addition to the above powers full authority to make and accept bills of exchange in the name of the firm. He may also borrow money on the firm's credit, and for that purpose pledge any goods belonging to the firm.

On the other hand, a partner is not an agent to bind the firm in matters not connected with the firm's business, unless he is specially authorised.

A partner, for instance, is not regarded as having authority to bind the firm by a document under seal. An express authority from the firm for such a purpose is required, and such authority must be under seal. Nor can a partner give a guarantee in the firm's name without special authority, unless it is the usage in the firm, or in other firms engaged in the like business, so to do. Nor can a partner bind his firm by a submission to arbitration.

The general authority of a partner to bind the firm may be restricted by agreement between the partners, but such agreement will not affect third parties unless they have

notice of it. If a third party, having notice of such agreement, enters into a contract with the partner outside his restricted authority, the firm is not bound by it. In order to prevent any controversy arising as to the scope of the notice, care should be taken to warn third parties that the firm will not be answerable for the acts of the partner outside of his limited authority.

A partner who enters into an unauthorised contract may, however, be personally liable upon it.

**§ 114. Liability of Partners.**—A partner during his lifetime is liable jointly with the other partners for all the debts and obligations of the firm incurred while he is a partner. A partner's liability begins when he enters the partnership; he is not liable for debts previously incurred. By retiring from the firm, and giving notice to that effect, he ceases to be liable for subsequent debts. But so long as he is a member of the firm, liability attaches to him jointly with his co-partners.

On the death of a partner the partnership is dissolved, and his private property then becomes liable to the payment of partnership debts in so far as they are unpaid, but subject to the prior payment of his own private debts. It follows from this rule that the creditors of a partnership have, on the death of a partner, a claim upon his private or separate property that they do not possess during his lifetime.

The practical effect of the rule is that the firm's assets are liable for the payment of the firm's debts; the separate property of the deceased partner is liable for his separate debts; but if the firm's assets are insufficient to pay creditors, they can recover what is unpaid from the assets of the deceased that remain, after paying his private debts.

In Scotland the law as to liability is different to that in England. There a partner during his lifetime is individually as well as jointly liable for the debts of the firm.

**§ 115. Liability of Persons "holding out."**—If a man, by words or conduct, represents himself as a partner, or allows others to do so, he is liable as a partner to any one who, on the faith of such representation, gives credit to the firm. The mere use of a man's name without his know-



ledge will not make him liable as a partner, the use of the name must be with his assent. A retiring partner, in order to avoid liability, ought always to give public notice of his retirement.

The principle of "holding out" does not apply to the executors of a deceased partner who permit the old name to be continued in use.

**§ 116. Partnership Property.**—All property originally brought into the partnership-stock, or subsequently acquired for the purposes of the firm, is regarded as partnership property. Hence if one partner buys land or shares with the money, and on account of, the firm, they will be regarded as the property of the firm, though the partner takes an assignment to himself.

When land becomes partnership property, it is as between the partners regarded as moveable and personal estate, and hence the legal representatives of a deceased partner, and not his heir, are entitled to such property.

**§ 117. Rights and Duties of Partners.**—The chief rights and duties of partners, in default of any agreement to the contrary, as between themselves are as follows :—

1. All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards all losses.

In the absence of any agreement to the contrary, a partner is not entitled to any remuneration for his services beyond his share of the profits, if any. Until the profits are actually ascertained, a partner is not entitled to any interest on capital subscribed by him. But where he makes an advance to the firm beyond the amount of capital he agreed to subscribe, he is entitled to interest at the rate of five per cent per annum from the date of such advance.

2. A partner in the course of the partnership business must not make any undisclosed profit for himself.

Hence he must account for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property, name, or business connection.

A partner too, if he carries on a business of the same nature as the partnership, and competing with it, must hand over to the firm all the profit he makes, unless he has the consent of his co-partners to the carrying on of such competing business.

3. Every partner is entitled to be indemnified by the firm in respect of payments made and personal liabilities incurred in the ordinary business of the firm, or for the preservation of the property of the firm.
4. Every partner is entitled to take part in the management of the partnership business.

Where any difference occurs, it is to be decided by a majority of the partners. But in three cases, the will of the majority is not recognised: (1) where a change is to be made in the nature of the partnership business, the consent of all the existing partners is required; (2) a majority cannot expel a partner unless there is a clause to that effect in the partnership agreement; and (3) a new partner cannot be introduced without the consent of all the existing partners.

5. Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives.
6. Every partner is entitled to have access to and to inspect and copy the partnership-books, which are to be kept at the place where the business is carried on.

**§ 118. Dissolution of Partnership.**—Subject to any agreement between the partners, a partnership is dissolved—

1. If entered into for a single undertaking, by the termination of the undertaking.
2. If entered into for a fixed term, by the expiration of that term.
3. If no fixed term has been agreed upon, by any partner giving notice to the other partners of his intention to dissolve the partnership. It is desirable that this notice be in writing.

4. By the death of a partner.
5. By the bankruptcy of a partner.

A partnership may, notwithstanding any agreement of the parties, be dissolved—

1. By the happening of any event that renders the business of the firm illegal.
2. By a decree of the court.

The court will, as a rule, order a dissolution of partnership where circumstances have arisen that render it just and equitable that the partnership should be dissolved; where one partner is found a lunatic after inquiry; where a partner becomes permanently incapable of carrying out his partnership agreement; where a partner has been guilty of conduct prejudicially affecting the carrying on of the business, or where the business can only be carried on at a loss.

§ 119. **Effects of Dissolution.**—After a dissolution, the authority of each partner to bind the firm continues as far as may be necessary to wind up the affairs of the partnership, but not otherwise. The property of the firm must be realised and applied in the following order: in paying (1) the debts and liabilities of the firm; (2) any advances made by a partner; (3) what is due to the partners in respect of capital. Any surplus left is to be divided equally amongst the partners.

These rules are to be taken as subject to the terms of the partnership agreement.

§ 120. **Authorities.**—The greater portion of the law of partnership has been codified in the Partnership Act of 1890. Sir F. Pollock's Digest of the Law of Partnership includes this Act. A larger treatise is the standard work of Lord Justice Lindley.

## CHAPTER II

### PRINCIPAL AND AGENT

§ 121. **Introductory.**—An agent is a person employed to do an act on behalf of another. The person for whom such act is done is called the principal. The division of labour has been carried to such an extent in connection with the distribution of goods, that sellers as well as buyers often find it to their advantage to effect sales and purchases through the agency of third parties.

Any person who has capacity to enter into a contract may appoint an agent: any person may, as regards third parties, be appointed agent, even though he be a minor. An agent is usually remunerated by commission or salary, but no consideration or payment is necessary to create agency.

§ 122. **Kinds of Agents.**—The chief classes of mercantile agents are factors, brokers, commission agents, and *del credere* agents.

A factor is an agent for sale to whom possession of the goods is given.

A broker is an agent employed by two parties to negotiate a contract between them. There are several kinds of brokers. A broker for sale is an agent to sell or purchase commodities—he is not entrusted with the possession of the goods. A stock and share broker is an agent employed to sell or buy stocks or shares. An insurance broker is an agent employed to effect a policy of insurance.

A commission agent is an agent employed not by two parties, but by one party to either sell or buy goods.

A *del credere* agent is an agent for sale who gives an undertaking to his principal that the parties with whom he contracts will fulfil their engagements.

A distinction is sometimes drawn between "special" and "general" agents. A special agent is one who has authority to act in a special case only. A general agent is one who is employed in many cases. The authority of the former is derived from his special authority; the authority of the latter is inferred from the previous cases in which he has acted.

§ 123. **Appointment of Agents.**—An agent may be appointed expressly by any form of words, except in special cases, where a special form is required.<sup>1</sup> It is generally desirable to have the terms of the appointment reduced to writing, so as to avoid any subsequent dispute as to the extent of the agent's authority.

The relation of principal and agent may be inferred from the conduct of the parties. A servant who is habitually sent by his employer to order goods from a shopkeeper is regarded as the employer's agent, and a wife who is permitted by her husband to order necessities for the household becomes his agent.

§ 124. **Ratification.**—Ratification of the acts done by one person on behalf of another is discussed by some writers under the head of appointment of agent. By ratification is meant the adoption of a contract by one person made by another on his behalf, but without his authority. It is not every act of another person that can be ratified, so as to make the person ratifying a party to the act and responsible for it. But where a contract is made by B. on behalf of A., without A.'s authority, in respect of something that A. can lawfully do, A. may adopt the contract and become liable on it, whether it be to his detriment or his advantage. The ratification may be by either words or conduct.

§ 125. **The Authority of Agents.**—The authority of an agent may be express or implied.

An authority is said to be express when it is given by

<sup>1</sup> *E.g.* An agent to execute a deed must be appointed by deed.

words spoken or written. The advantage of a written authority is that the written document furnishes excellent evidence as to the extent of authority conferred.

An authority is said to be implied when it is inferred from the circumstances of the case. For example, if A. is in the habit of sending his servant B. to buy goods from C. on credit, C. is justified in supposing that the servant has authority to buy on credit. If, however, the servant was in the habit of buying for cash, and he asks for goods on credit, the shopkeeper ought at once to inquire if the servant has authority to buy on credit. If he has no such authority, the employer will not be liable to pay for the goods.

An agent authorised to do any act has authority to do every lawful act necessary in order to do such act. Hence an agent employed to carry on a business may purchase all articles necessary to such business. An agent employed to sell, may do everything requisite to effect a sale, *e.g.* he can sell on credit when this is the usage of the business; an insurance agent can adjust and settle a loss; a debt-collecting agent can give receipts.

§ 126. **Duties of Agents.—Obedience.**—An agent ought to observe the directions of the principal. This is the primary duty of an agent, and any losses resulting from a failure to obey instructions must be borne by him. All orders as to time, price, and quality should be observed. In many cases a discretion is given to him; in such a case he may take what course seems best.

In the absence of any instructions, he ought to follow the usual course of business at the place where the business is to be transacted.

**Skill.**—The agent must conduct the business with as much skill as is generally possessed by persons engaged in a similar business. An agent ought to possess the skill requisite to enable him to discharge what he undertakes. If he is incompetent, and fails to disclose this incompetence to his employer, he must make good any resulting loss. Perfect skill is not required, only that which is possessed by those engaged in the particular business in question.

**Diligence.**—The agent must not only possess sufficient

skill and use it, but he must also act with reasonable diligence, *i.e.* with the diligence that would be shown by a competent man. Hence if an insurance broker fails to have the usual insurance clauses inserted in a policy, he must make good any loss, or if an agent for sale sells on credit without making proper inquiries as to the solvency of the purchaser, he also must make good any loss.

*Emergencies.*—In all cases of emergency the agent should communicate with the principal. This rule specially applies to the non-acceptance or dishonouring of bills of exchange.

*Fidelity.*—An agent is not allowed to use his position in order to benefit himself beyond his agreed remuneration. An agent for sale is not allowed to purchase for himself, unless he discloses every material fact to the principal. If the agent deals in the business of the agency on his own account, he must hand over all profit made. Fidelity to the principal is absolutely necessary.

*Accounts.*—An agent must keep proper accounts, and render them when required to his principal. A failure to keep accounts may deprive the agent of any right to his commission, and a failure to furnish accounts to the principal renders him liable to an action.

*Moneys.*—All sums received on the principal's account should be paid over, but the agent may retain out of such sums any moneys due to himself in respect of advances made or expenses incurred in conducting the business, as well as his own remuneration. Payment of remuneration is not, as a rule, due until the act authorised is done.

*Commission.*—An agent is entitled to retain any property, papers, or books of the principal until the amount due for commission and expenses has been paid.

**§ 127. Duties of Principal to Agent.**—*Reimbursing Expenses.*—The principal must reimburse the agent all the expenses he has necessarily incurred in carrying out the agency. The agent cannot recover needless expenses.

*Payment of Remuneration.*—The principal must also pay the agent the agreed salary or commission. The agent can, as we have seen, retain his remuneration out

of moneys that come into his hands for his principal. The agent may, however, forfeit his right to remuneration through misconduct.

The principal must indemnify the agent against the consequences of all lawful acts done by the agent under the authority conferred upon him. Hence if the agent by authority of the principal brings or defends an action, the principal must reimburse him all costs incurred in such action.

*Wrongful Acts.*—Where a principal directs an agent to do a wrongful act to a third party, and the agent, acting *bona fide*, and having no knowledge that the act is wrongful, obeys the direction, the principal must make good to the agent any loss he sustains. Hence if the agent innocently makes a false representation as to the quality of goods by the direction of the principal, the latter is liable.

§ 128. **Position of Third Parties.**—As a general rule, all contracts entered into by an agent as agent, are regarded as entered into by the principal, so long as the contract was within the scope of the agent's authority. It is immaterial whether the *name* of the principal be disclosed or not, provided the third party knew he was entering into a contract with *an agent* as such, and the parties intended that the principal should be bound. In order to protect himself from any liability, the agent should always take care that the contract is so drawn as to make the principal liable.

It follows that, as a rule, an agent cannot enforce a contract entered into by him as agent on behalf of a principal, and that he incurs no liability on such contract. But to this rule there are certain exceptions.

1. Where the agent does not disclose the name of his principal, the presumption arises that credit was given to the agent. The question to be decided in each case is, to whom was credit really given?
2. Where the contract relates to the sale or purchase of goods for a merchant resident abroad, it has been held that, without express authority, an agent cannot pledge the foreign merchant's credit, and is himself personally liable.



3. Where the agent contracts to be personally liable, he is liable.
4. An agent may be personally liable by the custom of a particular trade.

The agent may not disclose the fact that he is agent, and the third party may be entirely ignorant that he is dealing with an agent. In such a case the agent is liable to the third party; but if the third party discover that there is a principal, he may elect whether to proceed against the agent or the principal. B., for example, acting as agent for A., but not disclosing the fact of agency, sells goods to C., C. is entitled to look to B. for completion of the contract; but if C. finds out that A. was B.'s principal, he may (if necessary) sue either A. or B. The principal, if he desires, to enforce the contract, can only do so by submitting to all rights and obligations existing between the agent and the third party. In other words, if performance is sought by the principal from the third party, the third party is to have the same rights as if he were sued by the agent.

**§ 129. Falsely representing Oneself to be Agent.—**

If a man who has no authority to act as agent professes to enter into a contract on behalf of another, and there is a principal named who might adopt the contract, but does not do so, the agent can neither sue nor be sued on the contract. The agent is, however, liable to the third party for pretending to be an agent.

But if there be no principal who could adopt the contract, *e.g.* where the alleged principal is fictitious, the agent is held to have contracted in person, and may be sued as principal by the third party.

**§ 130. Position of Special Classes of Agents.—**

Special rules, derived partly from the usage of trade and partly from statute, apply to certain classes of agents.

*Factors.*—A factor has, as we have seen, possession of the goods. He is entitled to sell them in his own name, he may sell on the usual terms as to credit, and receive and give a receipt for the price. Under the Factors' Act of 1889, he has an implied authority to pledge the goods. His right to remuneration is protected by the lien given him by law for

the balance of his account. So long as the goods are in his possession, a third party who has no notice of the revocation of the factor's authority is protected as regards any lawful dealings with the factor relating to the goods (§ 127).

*Brokers.*—A broker for sale is supposed to be employed for the purpose of negotiating a sale. As soon as the contract is arranged, his duties are, in the absence of any agreement to the contrary, at an end. He has no authority as broker to receive the price.

Usually, however, a broker who is engaged in an established trade is assumed to have authority to buy or sell in accordance with the well-established usages of the trade, provided such usages do not change the essential character of the broker's employment. A usage for a broker for sale to purchase for himself is not one that would be recognised by the courts.

A broker may by the terms of his employment be given a wide discretion, and then in buying and selling he may exercise such discretion.

An *Auctioneer* is an agent for the public sale of property. Until the fall of the hammer he is the agent of the seller alone; but when the hammer falls he is agent of both parties, to do what is necessary to make the bargain binding, under the Statute of Frauds (§ 137).

He has possession of the goods and can receive payment for them in cash, but not by bill. He may receive payment by cheque, provided the cheque be duly honoured.

§ 131. *Sub-agents.*—An agent cannot, as a rule, employ another person to perform what he has undertaken to do, as the principal is supposed to have employed the agent to do the thing himself.

By the custom of trade in certain trades, or by consent of the principal, sub-agents may be employed. In choosing a sub-agent as much diligence will be required of the agent as in the execution of the undertaking.

Where a sub-agent is properly employed, he represents the principal, as regards third parties, just as if he had originally been appointed by him; but the sub-agent is responsible, as a rule, for his acts to the agent, and the

agent is responsible for the acts of the sub-agent to the principal.

An agent should be careful not to appoint a sub-agent until he has satisfied himself that he has authority so to do. If it should turn out that no such authority existed, the agent and not the principal will be bound by the acts of the sub-agent towards both the principal and third parties.

**§ 132. Termination of Agency.**—The relation of principal and agent may be terminated in the following ways :—

1. By mutual consent, as, for example, where the principal and the agent agree to bring the relationship to an end.
2. By revocation on the part of the principal.

As a rule, the principal can at any time revoke the agent's authority without the agent's consent, provided the agent has no interest in its continuance ; but he should give notice of such revocation, not only to the agent, but to the public, or at least to those with whom he is accustomed to deal. A person dealing with an agent is entitled, as a rule, to assume that the agent's authority continues until notice is given him that it is revoked. Where the agent has an interest in the execution of the authority, the principal cannot revoke the authority without the agent's consent, unless the original contract stated that it was to be revocable without such consent. Hence if a person is appointed agent for a definite time at a fixed salary, he cannot be dismissed before the time expires, unless he receives compensation.

3. By the agent renouncing the business.

An agent may withdraw from the agency, but if the agency was undertaken for a consideration, the agent must make good to the principal any loss arising from the renunciation.

4. By the expiration of time or the completion of the business.
5. By the death of either principal or agent.

All contracts entered into by the agent after the death of the principal are not binding on the estate of the

deceased principal, even though the third party dealing with the agent has no notice of the death.

6. By the principal or agent becoming of unsound mind.

7. By the bankruptcy of the principal.

§ 133. **Authorities.**—Sir William Anson's work on the Law of Contracts contains the leading principles relating to agency. *Principal and Agent*, by Mr. W. Evans, discusses the subject in detail.

## CHAPTER III

### THE SALE OF GOODS

**§ 134. Definition.**—A contract of sale is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called price, which the latter pays or agrees to pay. The object of the contract is to transfer the ownership or property in the goods from the seller to the buyer. By “property” is meant the general property in the goods, as distinguished from a special right such as possession. The owner of an article may, for instance, have given it in pledge, but that does not prevent him selling his “property” in the article, *i.e.* the right to redeem the pledge, and such sale will not affect the special right of the pawnbroker. Again, a merchant may have borrowed money from his bankers on the security of goods: this will not prevent him from selling the goods, though the buyer will, as a rule, acquire the goods subject to the rights of the bank.

**§ 135. A Sale and an Agreement for Sale.**—It is important to note the distinction drawn in the above definition between a “transfer” and an “agreement to transfer.” The former is often called a “sale,” and the latter an “agreement to sell.” A contract, as a rule, leaves one or both of the parties to it under an obligation or a number of obligations to do or perform something. For instance, in the wholesale market where transactions are carried out on a large scale by means of credit, a purchase usually leaves the seller under the obligation to deliver the goods, and the buyer under the obligation to pay the price at the

time and place agreed upon. Here at the moment of time the contract is made performance is on both sides postponed to a future date, and the distinction between the making of the contract and its performance is very marked. The contract is an "agreement to sell"; but in the retail market, where articles are often sold for cash and delivery is at once made, the formation of the contract and its performance take place practically at the same moment. For instance, a person enters a shop, purchases a pound of tea, pays for it and takes it away: here the contract is performed at the same time as it is entered into. The contract is a "sale." The importance of the distinction between a "sale" and an "agreement to sell" lies in the fact that the former does, and the latter does not, transfer the property from the vendor to the buyer. In a "sale" the property passes at once, in an "agreement for sale" the goods remain the property of the vendor until the time for delivery has arrived, or the conditions subject to which the property is to pass to the purchaser are fulfilled.

**§ 136. The Price.**—The consideration given by the buyer to the seller is called "price," and price always implies money. If goods be given without any consideration, there is a "gift"; if goods be given in exchange for goods, there is a "barter." As a rule, the price is fixed by the contract, but the parties may leave it to subsequent arrangement,—a course not often adopted, as it is likely to lead to litigation.

It is not unusual in certain cases for the parties where they cannot fix the price to leave it to be fixed in an agreed manner. Such an arrangement is legal. The usual manner adopted is to refer the price to valuers, and the price so fixed is as much a part of the contract as if it had been inserted in it.

Where none of the above methods are adopted for fixing the price, the buyer must pay a reasonable price. A reasonable price means "such a price as the jury upon the trial of the cause shall under all the circumstances decide to be reasonable. This price may or may not agree with the current price of the commodity." An example

may be given of a contract of sale where no price was fixed. A. ordered B. to build a new carriage with certain appointments, the whole to be ready by a certain date. The carriage was built, but on B. sending in his bill for £480, A. refused to take the carriage or to pay for it, alleging amongst other things that the omission of the price from the order invalidated the contract. The court held the contract was good, inasmuch as where the price was left uncertain, the law implied that a reasonable price would be paid.

**§ 137. The Form of the Contract of Sale.**—Up to the reign of Charles II. no special formalities were required as regards a sale of goods. The contract might have been oral or written, or partly oral and partly written. But in the twenty-ninth year of the reign of that sovereign, the celebrated statute called the Statute of Frauds was passed, and by the seventeenth section an important change was introduced as regards the sale of goods of the value of £10 and upwards. We have therefore to consider the form of the contract where the value of the goods is (1) below £10, (2) £10 and upwards.

(1) *Goods below £10 in value.*—A contract for the sale of goods below £10 in value may be

1. Oral.
2. Written.
3. Partly oral and partly written.
4. By deed.
5. Implied from the conduct of the parties.

A deed is rarely used to effect a contract for the sale of moveable property, at least where it is tangible. In the case of rights of action, such as shares in companies, a deed is usually necessary. Orders for goods are often given and accepted by letters; here the contract is to be gathered from the whole correspondence. Oral contracts, especially in small retail transactions, are the most usual. The moment the seller and the buyer agree as to what is to be sold and the price, there is contract of sale. The question as to when the ownership of the thing sold will pass to the purchaser will be treated subsequently (§ 155).

**§ 138. (2) Goods of the Value of £10 and upwards.**—Speaking generally, the effect of the Statute of Frauds upon contracts for the sale of goods of the value of £10 and upwards, is to require over and above the ordinary requisites of a contract the fulfilment of one of the three following provisions :<sup>1</sup>—

- (a) The acceptance by the buyer of part of the goods sold, and actual receipt of the same.
- (b) The giving of something in earnest to bind the bargain or in part payment.
- (c) The making of a note or memorandum in writing of the contract signed by the party to be charged, or his duly authorised agent.

**§ 139. (a) Acceptance and Receipt.**—The buyer must not merely *accept* part of the goods, but must also *receive* them, and the contract will not be good unless he does both. “The *acceptance* of part of the goods,” said Lord Blackburn,<sup>2</sup> “is an assent by the buyer meant to be final that this part of the goods is to be taken by him as his property under the contract, and as so far satisfying the contract. So long as the buyer can, without self-contradiction, declare that the goods are not to be taken in fulfilment of the contract, he has not accepted them. And it is immaterial whether his refusal to take the goods be reasonable or not. If he refuses the goods, assigning grounds false or frivolous, or assigning no reasons at all, it is still clear that he does not accept the goods, and the question is not whether he *ought* to accept, but whether he *has* accepted them. The question of acceptance or not is a question as to what was the intention of the buyer as signified by his outward acts.

<sup>1</sup> The words of the section are : “And be it enacted that from and after the four-and-twentieth day of June [1677], no contract for the sale of any goods, wares, or merchandises for the value of £10 sterling or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same or give something in earnest to bind the bargain or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised.”

<sup>2</sup> Blackburn on Sale, 2nd ed. p. 16.



"The receipt of the goods is the taking possession of them. When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them. Such a receipt is often evidence of an acceptance, but it is not the same thing: indeed the receipt by the buyer may be and often is for the express purpose of seeing whether he will accept or not. If goods of a particular description are ordered to be sent by a carrier, the buyer must in every case receive the package, to see whether it answers his orders or not: it may even be reasonable to try part of the goods by using them; but though this is a very actual receipt, it is no acceptance so long as the buyer can consistently object to the goods as not answering his order. It follows from this that a receipt of goods by a carrier, or on board ship, though a sufficient delivery to the purchaser, is not an acceptance by him so as to bind the contract, for the carrier, if he be an agent to receive, is clearly not one to accept the goods."

The exercise of the right of ownership over the goods amounts to receipt and acceptance, *e.g.* where the purchaser of a stack of hay resold it. The taking of a sample, which by the terms of the contract was to be part of the goods sold, may amount to acceptance. Mere examination of goods is not acceptance.

The question as to whether there has been an acceptance or a receipt of part of the goods is a question of fact, and not one of law. Where the matter is tried before a judge and jury, the latter have to decide "whether under all the circumstances the acts which the buyer does or forbears to do amount to an acceptance" (§ 153).

**§ 140. (b) Earnest or Part Payment.**—"Earnest" means money or other article given by the buyer to the seller, and accepted by the latter as indicative of his assent to the sale. The giving of earnest is unusual in commercial transactions, but in some country fairs a shilling or other coin is given as earnest in the sale of cattle or the hiring of servants. In one reported case, the owner of a horse sent his servant to a fair to sell it; an offer of £45 was made, and the vendor's servant taking a shilling in his

hand, drew the edge of it across the hand of the purchaser, and then replaced the shilling in his own pocket, a proceeding called by the witnesses "striking the bargain": it was held there was no "giving of earnest" within the meaning of the Statute of Frauds.

"Part payment" means payment of part of the price, either in money or in anything that is accepted in part satisfaction of the price. An agreement to set off a debt due to the buyer, the transfer of a bill or note, or the payment of interest due, will each amount to part payment.

§ 141. (c) **Memorandum or Note in Writing.**—The third method of making a valid contract for the sale of goods of the value of £10 and upwards, is by some note or memorandum in writing of the bargain, signed by the parties to be charged, or their agents.

Two points require consideration—

1. The form of the memorandum in writing.
2. How and by whom it should be signed.

§ 142. **The Form of the Memorandum.**—The memorandum need not be on one piece of paper; it may be contained on several pieces written at different times, provided the one that is signed makes such reference to the other papers as will enable the court to construe them all as one document. A series of letters between the vendor and the purchaser is an excellent example of a memorandum contained on several pieces of paper.

It is, however, essential that the evidence of the connection of the different writings should appear from the documents themselves, as oral evidence is not admissible to connect a signed paper with others unsigned. "In order to embody in the letter any other document or memorandum or instrument in writing, so as to make it part of a special contract contained in that letter, the letter must either set out the writing referred to, or so clearly and definitely refer to the writing, that by force of the reference, the writing itself becomes part of the instrument" which refers to it.

§ 143. **What the Memorandum ought to contain.**—

First, the name or a description of the party with whom the bargain is made.

Without such name or description it is impossible to say who are the parties to the bargain, and the writing is therefore incomplete, as it contains only part of the contract. When, therefore, the agent of the purchaser wrote down in a memorandum book the terms of a sale as follows: "Bought of A. 20 puncheons of treacle, £37 : 10s., to be delivered by the 10th December," and A. signed the memorandum, it was held that this was insufficient, as it did not show who was the purchaser.

The memorandum ought always, as a matter of precaution, to contain the names of both the vendor and the purchaser as such. But if instead of the name a description of either party sufficient to identify him be given, that will be sufficient. For instance, the name of a partnership is regarded as sufficiently describing the members of the firm who compose it. It has also been held that where an agent signs a contract without disclosing his principal, such contract is good as against the principal, who may sue or be sued in his own name, on the ground that the act of the agent in signing the agreement in pursuance of his authority, is the act of the principal.

Secondly, the terms of the bargain.

The memorandum should state what is sold and the quantity sold ; the price, if a price has been fixed ; the mode of payment, if this has been arranged ; as well as the other terms and conditions agreed upon. In short, the memorandum should show the whole bargain. As a rule, when the terms of a sale are reduced to writing, and signed by one party, there is a presumption that all the terms have been embodied in the memorandum, and as Lord Blackburn points out, "It is a difficult thing for a party to prove that a written admission signed by himself does not contain the whole truth. The jury would properly be very unwilling to find that the writing did not contain the whole agreement, unless there was some good reason given to explain the inaccuracy."<sup>1</sup>

Thirdly, the signature of the party to be charged.

It has long been settled that the only signature required is that of the party against whom the contract is to be

<sup>1</sup> Blackburn on Sale, 2nd ed. p. 58.

enforced. If the vendor has to bring an action for the price, he must produce a memorandum in writing of the terms of the contract signed by the purchaser: if the purchaser has to sue for the articles sold, he must produce a similar memorandum, signed by the vendor.

It follows from this, that if A. offer B. in writing (*e.g.* by letter) to sell him a certain quantity of goods at a given price, and B. accepts the offer *orally*, B. can, if necessary, sue A., inasmuch as there is a memorandum signed by A.; but A., if necessary, could not successfully sue B., as there is no memorandum signed by B. A vendor should therefore always secure the signature of the purchaser, and the purchaser that of the vendor.

The signature need not be the actual subscription of the name: a mark intended as a signature is sufficient. A mere description is not enough, and it is doubtful if the use of initials amounts to signature.

The signature may be in print; and as the statute does not specifically require the signature to be at the end of the memorandum, it may be at the beginning or in the middle. If, however, the alleged signature is not at the end of the document, the question arises, with what intention was the name inserted? If it is introduced merely incidentally, that is not sufficient. The name "must be so placed as to show that it was intended to relate and refer to, and that in fact it does relate and refer to every part of the instrument."

**§ 144. Signature by an Agent.**—The signature of a party to the contract may be made by an agent "thereunto lawfully authorised."

The agent must be a third party, inasmuch as it has been held that one of the parties cannot act as agent for the other in order to sign the contract.

The authority given to the agent to sign need not be in writing, and the fact of agency may be established in the same way as in other cases of agency (§ 123).

An auctioneer is an agent with a power of sale from the vendor, and therefore has an implied authority to sign the contract of sale embodied in the condition of sale on his behalf. The auctioneer has, however, no authority from

the highest bidder to make a contract for him, but the moment the lot is knocked down, the highest bidder becomes the purchaser, and in law (provided the sale is a public one) he is held to authorise the auctioneer to sign the contract on his behalf. The auctioneer, by entering the purchasers' names and the price opposite each lot in the catalogue, makes the contracts binding on the purchasers.

An auctioneer's clerk is not the agent of both parties; he is the agent of the auctioneer, and he can only sign on behalf of the parties where he is specially authorised so to do.

A broker for sale is a person whose trade is to "find purchasers for those who wish to sell, and vendors for those who wish to buy, and to negotiate and superintend the making of the bargain between them."<sup>1</sup> As the agent for both parties, he has authority to sign a memorandum, so as to make the contract binding.

When a broker succeeds in effecting a sale, he usually enters the terms in his broker's book and adds his signature. This signed entry constitutes the contract between the parties, and is binding on both. The broker, as such, having authority to make a memorandum of the contract between buyer and seller, a signed entry in his book is sufficient evidence of a memorandum by a duly authorised agent within the meaning of the Statute of Frauds.

As a rule, a broker prepares two copies of the entry, and signs them. One is called the "sold note," and is sent to the vendor. In substance it takes this form: "Sold for A. B. to C. D." The following is an example:—

"To Messrs. A. B.—Sold for your account to Messrs. C. and D. the following parcels of Spanish wool (a few bags more or less) of each mark, viz. (*specifying them and the rates of price*) customary tare and allowance. To be paid for by acceptances at two, four, six, and eight months. —Signed, M., *Broker*."

The other note is called the "bought note." In substance it takes this form, "Bought for C. D. of A." The following is an example:—

<sup>1</sup> Blackburn on Sale, 2nd ed. p. 78.

"Bought for Messrs. C. D. of Messrs. A. B. from 80 to 100 tons of palm oil, of merchantable quality, free from dirt and water, at £26 per ton, payable per cash, etc. The above oil warranted to arrive on or before the 30th June (current), *ex* 'Premier,' Fullerton, Cape Coast. Customary allowances.—Signed, T. W., *Broker*."

The party receiving and keeping either a bought or a sold note is held to know that the person signing it is acting as his broker, and to authorise him to do so. It is the better opinion that the bought and sold notes do not constitute the contract that is contained in the signed entry in the broker's books, but the value of the bought and sold notes consists in this, that in the absence of any entry in the broker's books, or in the case of the entry being unsigned, the bought and sold notes, if they agree, and if they contain the names of the parties, and all the other terms of the bargain, are sufficient to satisfy the Statute of Frauds. Indeed, either note alone will satisfy the statute if there be no variance between it and the other note.

Difficult questions arise where the two notes differ from each other, or from the signed entry. The rules applicable in such cases will be found in the works of Lord Blackburn and Mr. Benjamin on the sale of goods.<sup>1</sup>

**§ 145. Variations of a Written Contract.**—Where a contract of sale has been reduced to writing, any variation of its terms ought also to be put in writing. It is a well-established rule that a contract required to be in writing by the Statute of Frauds cannot be enlarged or varied by an oral agreement. Any verbal alteration will have the effect of preventing any action being brought on the contract as altered.

In some cases a verbal alteration has been held to amount to a rescission of the original contract and the substitution of a new one for it, inasmuch as there is nothing in the 17th section to prevent a written contract being rescinded by a verbal agreement.

**§ 146. Caveat Emptor.**—As a general rule, on a sale of goods, the buyer takes all risk as to quality, fitness; or

<sup>1</sup> See Benjamin on Sale, p. 268, where the leading rules are summarised.

condition of the goods. The buyer is supposed to examine the goods before the purchase, and he cannot afterwards complain that defects were not pointed out. "The buyer is always anxious to buy as cheaply as he can, and is sufficiently prone to find imaginary faults in order to get a good bargain, and the vendor is equally at liberty to praise his merchandise in order to enhance its value, if he abstain from a fraudulent representation of facts, provided the buyer have a full and fair opportunity of inspection, and no means are used for hiding the defects. If the buyer is unwilling to bargain on these terms, he can protect himself against his own want of care or skill by requiring a warranty from the vendor of any matters the risk of which he is unwilling to take upon himself."<sup>1</sup>

§ 147. **Conditions and Warranties.**—A contract of sale may be subject to any conditions agreed to by the parties, and may be accompanied by one or more warranties, expressed or implied, given by the seller to the buyer.

A warranty is an express or implied statement of something which the party undertakes shall be part of the contract, as, for example, where the seller warrants that a horse is sound, that a cargo of corn is of a certain quality, that the goods were manufactured by a particular firm, or that the commodity sold contains a definite percentage of some chemical ingredient.

No particular form of words is required: in every case it is a question for a jury whether the words used were intended to amount to a warranty or not. Any affirmation at the time of sale is a warranty, provided it appear in evidence to have been so intended. "In determining whether it was so intended," says Mr. Benjamin, "a decisive test is whether the vendor assumes to assert a *fact* of which the buyer is ignorant, or merely states an *opinion* or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case there is a warranty, in the latter not."

A representation to amount to a warranty requires to be

<sup>1</sup> Benjamin on Sale, p. 405.

<sup>2</sup> *Ibid.* p. 609.

made at the time the contract is entered into. Representations anterior to the contract, though they may give rise to actions, are not warranties, *e.g.* where the vendor, the day before the sale of a horse at Tattersall's, said to the purchaser, "He is perfectly sound in every respect," this remark was held not to be part of the contract.

A warranty may, however, be given after a sale, provided some consideration be given for it—the warranty in this case really forms an additional and separate contract.

**§ 148. Implied Warranties.**—In certain cases the law implies a condition or a warranty.

1. Where goods are sold by description, there is an implied condition that the goods shall correspond with the description. "If you contract to sell peas, you cannot oblige a party to take beans" (Lord Blackburn in *Bowes v. Shand*, 2 App. Cas. p. 480). A contract to sell rice shipped at Madras in March and April is not fulfilled by shipping rice in February.
2. Where goods are ordered by description from a seller who deals in goods of that description, and the buyer has no opportunity of examining the goods, there is an implied warranty that the goods shall be of merchantable quality and condition.

A firm of Liverpool merchants purchased certain bales of "Manilla hemp" to be shipped from Singapore. The hemp was delivered in such a damaged condition that it was not merchantable. It was held that the purchaser was entitled to damages, since the buyer bought for the purpose of sale, and the seller could not on any other supposition than that the article was merchantable have found a customer for his goods, and the buyer must be taken to have trusted to the judgment, knowledge, and information of the seller, as it is clear that he could exercise no judgment of his own.

No warranty, however, is implied where the buyer has an opportunity of inspecting the goods, inasmuch as he can exercise his own judgment in the matter.

3. Four warranties or conditions are implied in a sale by sample.



- (a) That the bulk of the goods shall correspond with the *description*.
- (b) That the bulk shall correspond with the sample in *quality and condition*.

The first of these rules is not exactly a warranty, since warranty rather relates to quality: it is a part of the general rule already referred to that where goods are sold by description it is implied that they shall correspond with the description. Hence where the purchase was of "foreign refined rape oil, warranted only equal to samples," and the oil tendered was equal to sample, but was not "foreign refined rape oil," it was held that the purchaser was not bound to accept it.

The second rule embodies the leading principle relating to sale by sample—the seller is held to undertake that the bulk shall agree with the sample.

- (c) That the buyer shall have a reasonable opportunity of comparing the bulk with the sample.

If the buyer desires to inspect the bulk, he should make his request at a proper and convenient time.

- (d) That the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on a reasonable examination of the sample.

At one time it was maintained that, upon a sale of goods by sample, no warranty that they were merchantable could be implied, but this view has not been adopted by the courts.

A firm of Manchester merchants agreed to manufacture and supply 2500 pieces of gray shirtings according to sample at 18s. 6d. per piece, each piece to weigh 7 lbs. The goods were manufactured and delivered in England, but on their arrival at Calcutta, it was found that 15 per cent of the weight of the goods consisted of China clay, introduced into the texture for the purpose of making them weigh the 7 lbs. per piece. At the time the goods were delivered to the purchaser's agent in England, the agent could not by inspection have ascertained that any foreign ingredient had been added. The court held that the shirtings delivered ought to have been *merchantable*, notwithstanding that they were purchased by sample, and not

being merchantable, owing to the presence of the China clay, the purchaser was entitled to damages.

A firm of cloth merchants ordered from a firm of cloth manufacturers at Bradford a quantity of cloth, described as "mixt worsted coatings," which were to be, in "quality and weight," equal to certain numbered samples. The coatings were, as the manufacturers knew, intended for sale to tailors and others. The coatings delivered were made in the same form as the samples, but on account of the want of cohesion between the warp and the weft, they gave way under the strain of ordinary wear, and a large quantity was returned to the cloth merchants. The merchants refused to pay for the goods, and when an action was brought against them they claimed damages for breach of contract. At the trial it was found that though the cloth was not merchantable, it corresponded with the sample; but it was also found that the defect was not apparent or discoverable upon such an inspection as was ordinary and usual upon worsted cloths of the class. The House of Lords unanimously held that upon such a contract there was an implied warranty that the goods should be fit for use in the manner in which goods of the same quality and general character ordinarily would be used. "When a purchaser," said Lord Herschell, "states generally the nature of the article he requires, and asks the manufacturer to supply specimens of the mode in which he proposes to carry out the order, he trusts to the skill of the manufacturer just as much as if he asked for no such specimens; and I think he has a right to rely on the samples supplied representing a manufactured article which will be fit for the purposes for which such an article is ordinarily used, just as much as he has a right to rely on manufactured goods supplied on an order without samples complying with such a warranty."

4. Where there is a contract for a sale of goods by a manufacturer, as such, there is, in the absence of any trade usage to the contrary, an implied warranty that the goods are of the seller's own manufacture.

A firm of shipbuilders entered into a contract to buy

from a firm of iron manufacturers 2000 tons iron ship-plates, to be of the quality known as "Crown." Before the plates were all delivered, the manufacturers closed their works and offered to complete the contract by delivering iron plates of "Crown" quality, but made by another firm. It was held by the court that the manufacturers were bound to supply plates of their own manufacture, and not plates made by other firms.

5. Where the buyer, relying on the seller's skill or judgment, orders goods for a particular purpose known to the seller, and the goods are of a description which it is in the course of the seller's business to supply (whether he be a manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

An examination of this rule shows that three conditions are necessary to imply the warranty.

- (1) The buyer must rely on the seller's skill.
- (2) The goods must be ordered for a special purpose known to the seller.
- (3) The goods must be of a description which the seller supplies in the course of his business.

A few examples will illustrate these points.

A carriage-pole was ordered from a carriage-builder for a carriage: the pole supplied broke, on account of its not being fit and proper for the carriage, and the horses were injured. The carriage-builder was held liable; all the above conditions being fulfilled.

A butcher bought from a meat-salesman a carcase which he inspected before purchase; no warranty was implied here, as the first condition, viz. relying on the seller's skill, was not fulfilled.

A farmer, who had bought from a butcher the carcase of a pig, sold it to another farmer. The meat turned out to be diseased, but it was held that there was no warranty that the meat was fit for food, inasmuch as the vendor farmer was not a dealer in meat; here the third condition was wanting.

6. An implied warranty of quality, fitness, or condition

may be annexed to a contract of sale by the usage of trade.

In the sale of certain drugs, it is usual to state in the catalogue whether they are sea-damaged or not, and in the absence of a statement that they were sea-damaged, it was always assumed that they were free from such a defect. This custom was held to be equivalent to an implied warranty of freedom from sea-damage.

**§ 149. Duty of the Seller to deliver.**—The primary duty of a seller of goods is to *deliver* them in accordance with the terms of the contract. By *delivering*, is meant transfer of the *possession*. Such transfer does not require, in order to be effective, the actual physical handing over of the goods: it is sufficient if the buyer be put in control of the goods, as, for example, where the key of the warehouse in which the goods are stored is handed to the buyer. The transfer of a bill of lading is a valid transfer of the goods it represents.

Where nothing is said about payment, the law presumes that the delivery and the payment will take place at the same time. The seller cannot insist on payment unless he is ready and willing to deliver, and the buyer cannot insist on delivery unless he is ready and willing to pay the price.

The seller is not bound to send or carry the goods to the buyer; it is sufficient if he affords the buyer reasonable facilities for taking possession of the goods. If nothing be said as to the *place* of delivery, it is assumed that the parties contemplate delivery at the place where the goods are at the time the contract is made, except when the goods are to be manufactured, and then the place of manufacture is regarded as the place of delivery.

It sometimes happens that the goods at the time of sale are in the possession of a third party: in such a case, care should be taken by the seller to obtain from such third party permission for the buyer to remove the goods, otherwise he may find himself unable to make delivery.

In many contracts, the seller undertakes to deliver the goods to the buyer. In such cases, if no time be fixed for delivery, the seller is bound to deliver within a reasonable

time. What is a "reasonable time" depends on the facts and circumstances of each case.

The seller ought to deliver the exact amount of goods ordered, neither more nor less. If he delivers more, the whole may be rejected, inasmuch as the seller is not at liberty to place on the buyer the duty of selecting, but the buyer, if he chooses, may take the whole at the contract rate, or may accept only the amount included in the contract, and reject the rest. If the seller delivers less, the buyer may reject or accept them.

The seller is not entitled to deliver the goods mixed with goods of a different description : if he does so, and the buyer cannot separate the goods bought from the other goods without trouble and expense, he may reject the whole.

Where the seller is authorised by the contract to forward the goods to the buyer, delivery to a common carrier or a carrier named by the buyer is equivalent to a delivery to the buyer, the carrier being, in contemplation of law, the buyer to receive the goods. The seller ought to take the usual precautions for ensuring the safe delivery by the carrier to the buyer.

**§ 150. Lien of the Seller.**—In order to protect a seller of goods who has not been paid, the law gives him certain rights that he can exercise, so long as they have not passed into the actual possession of the buyer.

These rights are (1) lien, (2) stoppage *in transitu*, and (3) resale.

The unpaid seller of goods, if he has not parted with possession of them, is entitled to retain possession until payment or tender of the price in the following cases :—

- (a) Where the goods have been sold without any stipulation as to credit.
- (b) Where the goods have been sold on credit, but the time for which credit was given has expired.
- (c) Where the buyer has become insolvent.

The lien will be lost—

- (a) If the goods be delivered to a carrier for transmission to the buyer, unless the seller has reserved the right of disposal.

(b) If the buyer or his agent obtains possession of the goods.

(c) If the seller waives his right.

The delivery of part of the goods will not destroy the lien on the remainder, unless such delivery amount to waiver.

**§ 151. Stoppage in Transitu.**—Where the goods are delivered to a carrier for transmission, the seller's lien is gone; but if the buyer becomes insolvent whilst the goods are in transit, the seller may resume possession of them, and may retain them until the payment or tender of the price. It has already been pointed out that (§ 149) a carrier is an agent of the buyer to receive goods from the seller, but such receipt of goods does not put an end to the seller's right of stoppage; an actual receipt by the buyer is required for that purpose.

Goods are deemed to be *in transitu* not only while they remain in the possession of the carrier, whether by water or land, and although such carrier may have been named and appointed by the consignee, but also when they are in any place of deposit connected with the transmission and delivery of them, and until they arrive at the actual or constructive possession of the consignee.

No particular method of exercising the right has been prescribed. The seller may take actual possession, or he may give a notice to the carrier or person in possession, stating his claim, forbidding any delivery to the buyer, or requiring that the goods shall be held subject to his orders.

On receipt of such notice, the carrier or other person in possession ought to deliver the goods to the seller, or hold them at his orders.

If before the receipt of any such notice, the goods have arrived at their destination and have been delivered to the purchaser or his agent, or if the carrier hold them as warehouseman for the purchaser, and no longer as carrier, the *transitus* and the right of stoppage are at an end.

**§ 152. Resale.**—The non-payment of the price does not give the seller the right to rescind the contract, and if he

resells the goods, he is liable to an action for damages at the suit of the buyer. In order to protect himself, a seller ought in the contract to reserve to himself the right of resale in case the buyer makes default. There is some authority for saying that the seller would be justified in reselling (1) where the goods are of a perishable nature, and (2) where he gives the buyer notice of his intention to resell, and the buyer does not within a reasonable time pay for the goods.

**§ 153. Acceptance by the Buyer.**—The leading duties of the buyer are, first, to accept the goods, and, secondly, to pay the price.

In the absence of any special agreement, the buyer is not entitled to wait for delivery (§ 149), it is his duty to take possession within a reasonable time.

If the buyer has not previously examined the goods, he is entitled before accepting to a reasonable opportunity of inspecting the goods for the purpose of ascertaining if they are in conformity with the contract. The mere *receipt* of goods is not the same as *acceptance*, as the receipt may be merely for the purpose of examination (§ 135).

The buyer will be deemed to have *accepted* the goods—

1. When he informs the seller that he has accepted them; or
2. When he has received the goods and does any act in relation to them inconsistent with the ownership of the seller; or
3. When he allows a reasonable time to elapse without informing the seller that he has rejected them.

A buyer is not bound to accept delivery in instalments unless this has been agreed to, expressly or impliedly, by the contracting parties.

A buyer who rejects goods, having the right to do so (§ 139), may return them; but, as a rule, it is sufficient if he notifies the seller of his refusal to accept them.

**§ 154. Payment of the Price.**—If no credit be given, the buyer of goods is not entitled to them until he pays the price, and he should be ready to do so as soon as

delivery is made. Where credit is given, the buyer is entitled to the goods at once, subject to the seller's right of stoppage whilst they are in transit, in case the buyer becomes insolvent (§ 151).

The contract may require the payment to be in one of two forms, viz. "cash" or "bill." Sometimes the buyer has an option, *e.g.* "bill with option of cash, less discount." Where the payment is to be in "cash," and there is a dispute as to the amount payable, care should be taken that any tender made by the buyer is in proper form. The money should be actually produced, and an opportunity given to the seller to examine and count it. Copper coins are a valid tender up to 1s. ; silver coins up to 40s. ; gold coins and Bank of England notes to any amount. The exact sum should be tendered, as the buyer is not entitled to tender a larger sum than is due with a demand for change. The buyer, if the amount paid is £2 and upwards, may tender a blank receipt, stamped, and the seller is bound to fill it up and pay for the stamp—a rule that practically throws on all creditors the duty of giving stamped receipts for sums amounting to £2 and upwards.

Where payment is made by "bill," it is always implied, in the absence of any agreement to the contrary, that if the bill be not honoured the vendor is entitled to sue for the price. But the parties may agree that the bill is to be taken in absolute discharge of the debt—in such a case, if the bill be not honoured, the seller may sue on the bill, but he cannot sue for the price of the goods.

Payment made to a duly authorised agent is the same as payment to the seller. A buyer ought, however, to assure himself that the agent is authorised *to receive payment*. A factor is an agent to receive payment, but a broker is not. A shopman is authorised to receive payment over the shop counter, but not elsewhere. An auctioneer, as a rule, can receive payment in cash. Payment to a wife is not a valid payment to her husband.

Where the seller prescribes a certain mode of payment, any payment made in such mode is good though the money never reach the seller. Hence if the seller requests a



remittance by post, such a form of remittance will be good though the letter be lost or stolen.

**§ 155. The Transfer of Ownership.**—The object of the contract of sale is to transfer the right of property or the ownership of the goods from the seller to the buyer. In many cases this transfer takes place at the moment of time the contract is entered into, but in other cases the parties do not contemplate any immediate change in the ownership of the goods; and if the contract be silent on the point, the law has to decide when ownership passes.

The practical importance of determining when the property passes lies in this, that, unless otherwise agreed, the moment the property passes to the buyer the goods are at his risk, whether delivery has been made or not. Any loss happening to the goods falls on the buyer. If, for example, they are destroyed by fire after the ownership has passed, the buyer is bound nevertheless to pay the price if he has not already done so.

A marked distinction is drawn between “ascertained” and “unascertained” goods. By the former is meant specific individual goods, *e.g.* a particular horse, a specific carriage, a particular bale of cotton. By the latter is meant goods not specifically ascertained, *e.g.* goods that have to be manufactured, measured, or weighed. The following principles may be laid down as regards ascertained goods:—

1. Where the sale relates to ascertained or specific goods in a deliverable state, and the contract is unconditional, the ownership passes immediately, *i.e.* at the time the contract is made, and it is immaterial whether payment or delivery, or both, be postponed. For example, on the 4th January, B. sold to A. a stack of hay for £145, payable on the 4th February, the hay to stand on the premises until the 1st May; the hay accidentally caught fire on the 20th January and was burned: it was held that the ownership in the hay passed to A. at the date of the contract, and therefore the loss fell upon him.
2. Where the seller has to do something to the goods

in order to put them into that state in which the purchaser would have to accept them, the property does not pass until such thing is done. Hence where a ship in progress of being built is purchased, and the contract shows that the parties contemplated the purchase of the ship when finished, the ownership will not pass until the vessel is completed.

3. Where the seller is bound to weigh, measure, or test the goods, or do some other act or thing with reference to the goods, so as to ascertain the price, the property does not pass until such has been done. Hence when a stack of bark was sold at £9 : 15s. per ton, and part was weighed and paid for, it was held that the ownership of the unweighed residue had not passed.
4. Where the goods are delivered by the buyer on "approval," or on "sale or return," the property passes when the buyer does any act adopting the transaction, or on the expiration of the time fixed for return of the goods, or if no time be so fixed, on the expiration of a reasonable time.

**§ 156. Transfer of Ownership in unascertained Goods.**

—In the case of "unascertained" goods, the property does not pass until the goods are ascertained. Goods are "unascertained" if they have to be manufactured. Hence if a machine is ordered to be made, the property will not pass until the machine is finished. Goods are also "unascertained" when the contract relates to a quantity of a greater quantity, as, for example, where a buyer purchases 20 tons of oil out of the seller's stock: until the 20 tons are set aside or marked as the actual oil to be supplied, the property in the oil will not pass to the buyer.

The question sometimes arises as to the person who is to make the appropriation. In one type of case, *e.g.* where a merchant gives an order to another to send him a certain quantity of merchandise, it is assumed that the right of appropriation belongs to the seller. In a second type of case the appropriation is not regarded as complete until it has been assented to by the buyer. In a third type of

case the buyer has, by the terms of the contract, the right of appropriation. It is obvious that when the contract is silent on the point, the questions as to who is to appropriate, and when the appropriation is to take place, depend largely on the circumstances of each case.

**§ 157. Reservation of the Right of Disposition.**—The seller may by the contract reserve to himself the right to dispose of the goods until certain conditions are fulfilled. In such a case, notwithstanding delivery, the property does not pass until the conditions are fulfilled. In some cases where the price is payable by instalments, the seller reserves this right, *e.g.* where goods are purchased on the three years' system of payment.

**§ 158. Title acquired by the Buyer.**—As a general rule, a buyer acquires no better right or title to the goods than that possessed by the seller. It follows from this principle that if the seller had stolen the goods, the buyer, even though he was unaware that the goods had been stolen, would not acquire the ownership.

In the interests of trade, and for the protection of dealers, certain exceptions to the above rule have been admitted by the law. The most important of these exceptions are as follows :—

1. Where goods, except horses, are sold in "market overt," according to the usage of the market, the buyer will acquire a good title, provided he buys them (*a*) in good faith, and (*b*) without any notice of the defect or want of title on the part of the seller.

In the city of London, every shop is a "market overt" for such foods as the owner usually trades in. Outside of London, a "market overt" means a particular spot of ground set apart for a market by grant or prescription. In London, every day except Sunday is a market-day, but in the country, markets are held on specified days. A buyer of stolen goods, in good faith, and without notice of the theft, in market overt acquires the property in the goods; but by statute (24 and 25 Vic. c. 96, s. 100), if the thief be prosecuted to conviction, the property in the goods will revert on the original owner.

2. Where the seller has acquired the goods under such circumstances that his right to them could be set aside, a buyer from him will acquire the ownership if he buys in good faith and without notice of the defective ownership of the seller. For example, A. bought a quantity of iron from B., giving bills purporting to be accepted by C., who was really a fictitious person. A. resold the iron to D., who purchased *bona fide*, and it was held that D. obtained the ownership of the goods, though before he bought them B. could have had the contract of sale with A. set aside.

**§ 159. Remedies of Seller and Buyer.**—Reference has already been made to the remedies that the seller may adopt where the buyer refuses to pay the price, and the goods have either not left the seller's possession or are in the course of transit (§§ 150, 151).

Where the goods have reached the buyer, and the property has vested in him, the only remedy of the seller is to bring an action for the price. Care must, however, be taken not to bring any action before the time at which the price is payable. Interest cannot be recovered where there is no agreement for the payment of interest, or where the debt was to be discharged by a negotiable instrument.<sup>1</sup> If the buyer refuses to accept the goods, the seller may bring an action for damages for non-acceptance. If the seller refuses to deliver the goods, the buyer may bring an action for damages for non-delivery. The damages given will usually be the difference between the sale price and the market price on the day the goods should have been delivered, or if no time for delivery was fixed, the day of the refusal to deliver. In certain cases the judge may order the delivery of the goods.

In the case of a breach of warranty, so long as the buyer has not accepted the goods and the property has not passed, he may reject the goods.

But if he has accepted the goods, or if the property in

<sup>1</sup> Or in special cases coming under the 3 and 4 Will. IV. c. 42, s. 28. See Mayne on Damages, p. 153.

the goods has passed to the buyer, he cannot reject them, but he may if sued for the price set up the warranty as a ground for reducing the same, or he may bring an action for damages.

§ 160. **Authorities.**—Chalmers's *Digest of the Law of Sale* contains a concise digest of the law. The well-known works of Lord Blackburn and Mr. Benjamin are standard treatises. *The Law of Sale and Commercial Agency*, by Mr. Campbell, will also be found useful.

## CHAPTER IV

### INSURANCE

**§ 161. Definition.**—By a contract of insurance one person undertakes, in consideration of a payment called the premium, to indemnify another against some risk or to pay a sum of money on death to a man's representatives. The system of insurance has been so extended during recent years that there is scarcely any form of risk that cannot be insured. But the leading kinds of insurance are Marine Insurance, Life Insurance, and Fire Insurance. The document in which the contract of insurance is contained is called the policy; the party who undertakes the risk is called the insurer, or where he subscribes the policy, the underwriter; the party indemnified against the loss is called the insured or assured.

**§ 162. Fire and Marine Insurance based on Indemnity.**—In a life insurance the insurer undertakes to pay a fixed sum on the death of the insured; but in fire and marine insurance, whatever sum be mentioned, the insurer is bound to make good the actual loss only, and under no circumstances is the insured entitled to a profit out of the loss. The result is that both parties have a common interest in the preservation of the thing insured. As a rule, the risks insured against are limited and defined in the instrument or policy embodying the terms of the contract. In some exceptional cases, *i.e.* in "valued policies," the value of the article is agreed, and such agreement is conclusive,

but otherwise the insured is only entitled to be reimbursed his actual loss.

**§ 163. All material Facts must be disclosed.**—Whatever be the kind of insurance, complete disclosure is required of all facts relating to the risk to be undertaken by the insurer. If any information be kept back that would have affected the insurer in undertaking the risk, the policy will be void. A concealment will have the same effect as a misrepresentation. The insured is, however, only bound to disclose that which he knows, and where he has no information on any point raised he should say so. Statements as to "belief" are not statements of facts, and in such a case the insurer takes the risk.

**§ 164. The Insured must have an Interest in the Subject Matter.**—Any person may insure, provided he have an "insurable interest" in the event insured against. As far as life insurance is concerned, a man may insure his own life, but he cannot insure the life of another unless such other person has a claim upon him for support enforceable by law.

In the case of fire insurance the insured must possess an insurable interest, both at the date of the policy and at the time the fire happens. As regards buildings, any one having an interest in the property can insure, but he can only retain out of the insurance moneys the value of his own interest. Common carriers, factors, brokers, wharfingers, pawnbrokers, and commission agents have an insurable interest in the goods in their possession.

The same rule holds as regards marine insurance.

**§ 165. The Premium.**—The money payment in consideration of which the insurer undertakes the risk is called the premium. It is the universal practice of insurers, except in the case of marine insurance, to stipulate that the contract shall not take effect until the premium has been paid. The premium may consist of a lump sum or of periodical payments. Where the premiums are payable yearly the insurance is from year to year; if they are paid half-yearly or quarterly the insurance is from half-year to half-year or from quarter to quarter. In the case of an

insurance extending over a number of years, a certain number of days, called days of grace, beyond the day fixed for the payment of premiums are allowed for payment.

Unless there is an agreement to the contrary, if a loss occur during these days of grace, the insured has no right of action on the policy. Strictly speaking, the premiums should be paid on the day appointed. Insurance companies, however, as a rule, provide that the policy shall be good and valid during the days of grace allowed.

It is a recognised rule that if the risk be not incurred the premium paid is recoverable,—no risk, no premium. The risk is regarded as the consideration for the premium, and if it be not incurred, the consideration fails and the premium must be returned. On the other hand, if the risk once commences no portion of the premium is returnable.

### MARINE INSURANCE

§ 166. **Underwriting.**—Marine insurance takes place where a ship or cargo or freight is insured against loss during a fixed time or between one port and another. The insurance is generally effected with individuals who are called underwriters, from the custom of the insurer entering into the contract by writing under or at the foot of the policy his name and the amount of risk he undertakes. A well-known association of underwriters is known by the name of Lloyd's. The members meet and carry on their business in rooms over the London Royal Exchange. Lloyd's underwriters individually sign their names at the foot of the policy, and opposite thereto the sum insured by each, in figures and also in words, with the date of so doing. This is called underwriting the policy for so much, and each underwriter thereby enters into a separate contract with the insured for the amount set opposite to his name. Underwriting is also undertaken by companies, the form of underwriting depending on the articles of association or other instrument constituting the company. A number of shipowners sometimes join together for the mutual insurance of their



respective vessels. Here there are no premiums, the losses in each year being made good by the members in proportion to the amount of ship property insured in the club. Insurance agents are often employed to negotiate a policy by both the insurer and the insured.

§ 167. **What may be insured.**—Not only may a ship or its cargo be insured, but also any special property in the same, such as the shipowner's interest in the freight. Freight is the price to be paid by a shipper of goods to the shipowner for the carriage of goods by ship. It is not due unless the goods are delivered at the port of destination. Many events might happen that would prevent such delivery, and in order to protect himself against possible loss the shipowner may insure his expected freight.

§ 168. **Kinds of Policies.**—The leading kinds of policies are valued and open policies, and time and voyage policies.

A *valued* policy is one in which the agreed value of the subject insured, as between the insured and the underwriter, is stated on the face of the policy. This value is conclusive, whether it be greater or less than the value in the open market. Ships and freights are generally insured in valued policies.

An *open* policy is one in which the value of the subject insured is not stated in the policy as between the insured and the underwriter, but is left to be proved by evidence in case of loss. Goods are generally insured by open policies, as their value can be ascertained by invoices, valuations, or other methods.

A *voyage* policy is one in which the risk is undertaken during a particular voyage between ports specified in the policy, *e.g.* from London to New York.

A *time* policy is one in which the risk is undertaken during a fixed time specified in the policy, *e.g.* from noon of the 1st January 1893 to noon of the 1st January 1894.

§ 169. **The Slip and the Policy.**—When a broker is requested to effect an insurance, he prepares a brief statement of the leading particulars of the risk to be insured. This statement, called the *slip*, is presented to the under-

writers, who initial it for the sum each proposes to underwrite. In the case of companies a separate slip is presented to each. A policy embodying the terms contained in the slip is subsequently prepared and underwritten, as the law requires that every agreement for sea-insurance to be valid must be expressed in a policy. The slip by itself cannot be enforced in the courts, but as it represents the terms to which the parties have agreed, these identical terms ought to be embodied in the policy.

The form of policy in use is very complex, but as every clause has undergone a searching examination in the courts, the meaning of the various clauses is well known. The policy is the only legal evidence of the terms of the contract, and after it has been underwritten no material alteration can be introduced without the consent of all parties.

**§ 170. Terms of the Policy.**—A policy usually contains the name of the insured, the name of the ship, the subject matter of the insurance, a statement of where the voyage is to begin and end, the perils insured against, permission for the insurer to take steps if necessary to protect the property, the date, the amount of premium, and the sum underwritten (see Appendix). The policy must also be stamped. Special attention may be directed to warranties and to the clause called the memorandum.

**§ 171. Warranties.**—Underwriters, for their own protection, often stipulate for the insertion of certain express warranties in the policy. A warranty may be defined as a stipulation upon the truth or fulfilment of which the validity of the entire contract is to depend. Express warranties usually relate to the time of sailing, *e.g.* where it is alleged that the ship has sailed or that it will sail on or before a certain day, or to the neutral character of the ship and cargo during a time of war. Apart from these express warranties, there are certain warranties implied by law that have the same force as if they were formally set out in the policy itself.

The leading implied warranties are: (1) that the ship is seaworthy, (2) that the ship will not deviate, and (3) that the voyage is legal.

1. *Seaworthiness*.—In the case of a voyage policy, *i.e.* where the insurance is in respect of a voyage from one port to another, the policy implies that the ship is seaworthy at the time the risk begins.

By seaworthy is meant "in a fit state as to repairs, equipments, crew, and all other respects, to encounter the ordinary perils of the risk." If the ship is lost, and it appears that she was unseaworthy, the underwriters are not liable on the policy. In the case of a "time" policy, which is usually effected when the ship is at sea, no warranty of seaworthiness is implied, as the owner has no means of knowing her condition.

2. *Not to deviate*.—A deviation from the proper course of the voyage releases the underwriters.

In almost all voyages usage has prescribed a certain course as the best, and it is risk to the vessel whilst pursuing this course that is insured against.

3. *Legality of voyage*.—An insurance on a ship engaged in a trade or venture illegal by the municipal law of the country in which the insurance is effected is void.

For instance, an insurance in England on a vessel engaged in smuggling goods into England is not binding.

§ 172. *The Memorandum*.—At the foot of the policy is found a clause that has for its object the protection of the underwriter against trifling claims and the exemption of certain perishable goods from the policy except under certain circumstances. The effect of the clause is as follows: The underwriter is not liable to make good (1) any partial loss in the case of corn, fish, salt, fruit, flour, and seed; (2) any partial loss under 5 per cent in the case of sugar, tobacco, hemp, flax, hides and skins; (3) any partial loss under 3 per cent in respect of other goods or of the ship and freight: except in all these cases where the loss is incurred (*a*) in order to save the vessel and cargo, *e.g.* by throwing goods overboard, or (*b*) by the ship being stranded.

Two terms are used in the memorandum that require



explanation. The word "average" is equivalent to "loss," hence, "free from average" means "free from loss." The term "general average" means a loss incurred for the benefit of the ship and cargo.

§ 173. **Total and Partial Loss.**—A ship may be totally lost or it may be injured only. A distinction is therefore drawn between *total* loss and *partial* loss.

A *total* loss is when there is in fact or in law a complete loss of the vessel; a *partial* loss is where the vessel sustains an injury only. In the former case the underwriter has to make good the loss, in the latter the injury. A *total* loss takes place when the ship wholly perishes. This is called *actual* total loss. But it also occurs where the ship is not wholly destroyed, but its destruction is so probable that recovery is exceedingly doubtful or too expensive to be worth undertaking: in such a case, if notice of abandonment be given, the vessel is regarded as wholly lost. This is called *constructive* total loss.

If the owner finds that it is impossible to save a vessel that is driven on the rocks by force of weather, and that there is every probability that she will become a complete wreck, he may before the completion of the wreck give notice orally or in writing to the underwriters that he abandons all interest in the vessel, and on doing so he is entitled to ask the underwriters to carry out their contracts as if the vessel had been totally destroyed. The notice must be unconditional and be given within a reasonable time after the owner hears of the loss. The notice has the effect of transferring the whole interest in the ship to the underwriters, who endeavour where possible to save the whole or part of the property.

In the case of a *partial* loss the damage has to be ascertained. Where the ship is damaged, two-thirds the costs of repairing are usually allowed. Where goods are damaged, the rule for ascertaining the loss is as follows: ascertain three things—(1) the value at the port of destination as if uninjured; (2) the value at the same port as if injured; (3) the original value. Then make the following calculation. As the value uninjured is to the value when damaged, so is

their original value to the fourth quantity. This fourth quantity being subtracted from the original value, gives the amount to be paid by the underwriters. For instance, suppose goods valued £100 in London are shipped to Calcutta, where they would sell uninjured for £200, but owing to damage incurred on the voyage they bring £150.

$$200 : 150 :: 100.$$

The solution of this problem gives £75. Subtracting £75 from £100, we obtain £25 as the sum to be paid by the underwriters.

In this case the insured lost one-fourth the value of the goods at the port of destination, but the underwriter does not undertake to repay him more than one-fourth of the original value. The original value is regarded as the invoice price at the port of loading, plus the expenses of putting the goods on board, the premium for insurance, and commission.

#### LIFE INSURANCE

§ 174. **Not an Indemnity.**—A life insurance is a contract by which the insurer, in consideration of a premium usually paid yearly, undertakes to pay to the person insuring or his representatives a certain sum of money in case the insured dies within the period covered by the premium. The contract is an agreement to pay a given sum at death; it is not a contract of indemnity. No question therefore arises as to whether any person suffers damage by the death of the party insured; the death is the condition on which the sum is payable.

§ 175. **Insurable Interest.**—The person insuring must possess, as we have seen, an “insurable interest” on the life of the party insured. By an “insurable interest” is meant a pecuniary one. A man is regarded as having a pecuniary interest in his own life, a wife in that of her husband, and a creditor in the life of his debtor. A father, as such, has no insurable interest in the life of his son.

§ 176. **The Proposal and the Policy.**—The first step usually taken towards effecting an insurance is the filling

up of a proposal giving particulars relating to the health and habits of the proposer. A declaration has also to be signed that the statements are to be taken as the basis of the contract, and that any untrue statement shall avoid it. This document is regarded as part of the policy. The greatest care should be taken in filling up the proposal, as any mis-statement will prevent the insurance moneys being received, even though the proposer passes the usual medical examination. The policy itself states the risks insured against, the time during which it is to be in force, and the names of the parties and the amount of the premium. The policy usually provides that it shall be forfeited by non-payment of the premiums, by residing outside certain specified limits, or by suicide, death by duelling, or the hands of justice, except so far as the *bona-fide* interests of third parties are concerned. This exception is introduced so as to protect the interest of any person who has purchased the policy or acquired any interest in it.

**§ 177. The Premium.**—The premium is usually made payable in annual, or half-yearly, or quarterly instalments. Sometimes a single payment is made to cover all premiums. Strictly speaking, the premium is payable on or before the day appointed, even though days of grace are allowed. But it is the general custom of companies, in the case of death after the day for payment, but before the days of grace have expired, to pay the amount of the policy, less the premium due. The insured should take care to see that such a clause is inserted in the policy.

**§ 178. Assignment.**—A policy of life insurance may be assigned or sold to a third party. The assignment should be in writing, and notice of the assignment should be given by the assignee to the insurance company. A policy may also be mortgaged to secure the repayment of a sum of money.

## FIRE INSURANCE

**§ 179. Definition and Nature of the Contract.**—The contract of fire insurance is a contract by which one party,

in consideration of the payment of a sum of money, undertakes to make good any loss or damage by fire, not exceeding a named amount, which may occur during a specified period. The contract is, as we have pointed out, one of indemnity—the sum named in the policy is not the measure of the loss, but the limit of what can be recovered. The insured must have an interest in the subject matter. As a rule, any subsisting right or interest in the property insured is an insurable interest. A trustee, for example, may insure the trust-estate, and so can the person entitled to the income of such estate. An insurance company in which property is insured has a sufficient “interest” to enable it to reinsure. A mere agent who has no possession of the property nor any claim upon it cannot insure on his own account. But any one who has possession and is responsible in case the property is destroyed by fire can insure, *e.g.* the pawnbroker. A factor, a warehouseman, or a wharfinger, as well as a common carrier, has an insurable interest in the property that comes into his possession in the ordinary course of trade.

§ 180. **The Risk undertaken.**—An insurance company that undertakes the risk to property through fire usually inserts stipulations in the policy with the object of defining the risk more clearly.

By “fire” is meant ignition of the property itself or some substance near it not used to create heat. Damage arising from excessive heat, the property not igniting, is not damage due to fire within the meaning of a policy. Something must catch fire, but so long as this occurs any resulting loss, *e.g.* by smoke or by water used to put out the fire, is recoverable though the insured property has not itself caught fire. In case a fire is due to an explosion, the company is liable, but not where the explosion of itself causes the damage. Clauses are frequently inserted in a policy with the object of defining the company’s liability where there is an explosion, *e.g.* “The policy does not cover loss or damage by explosion, except loss or damage by explosion of gas in a building not forming part of any gas works, or by explosion of domestic boilers and domestic heating apparatus.” Gas works are excepted as a specially hazardous risk.

Loss due to the natural heating that occurs sometimes in hay, corn, seeds, and other property is usually excluded, *e.g.* "The policy does not cover loss or damage by fire to property occasioned by or happening through its own spontaneous fermentation or heating."

It is also usual to except any loss by fire due "to invasion, foreign enemy, riot, or civil commotion."

**§ 181. The Property insured.**—Certain kinds of property are not included in the policy unless specifically mentioned. The following is a usual clause:—

"The policy does not cover china, glass, looking-glasses, jewels, clocks, watches, trinkets, medals, curiosities, manuscripts, government stamps, prints, paintings, drawings, sculptures, musical, mathematical, or philosophical instruments, patterns, models, or moulds, unless specially mentioned."

Certain other forms of property are completely excluded *e.g.* "deeds, bonds, bills of exchange, promissory notes, money, securities for money, or books of account." Care should be taken to see that the ownership of the property is correctly described. As a rule, "property held upon trust or upon commission" is excluded unless expressly described as such. An insurance by a husband of his own property does not cover the property of his wife or of his servants or his visitors.

**§ 182. The Proposal.**—Where it is desired to effect an insurance against fire, it is necessary to make a proposal stating particulars of the risk to be insured. In drawing up this proposal care should be taken (1) to describe accurately the property to be insured and the building, if any, in which it is contained; (2) not to make any misstatement; (3) not to omit any known fact material in estimating the risk. Not only does non-disclosure of material facts known to the proposer vitiate the policy at law; but a clause in the policy itself usually declares that it is to be void if such non-disclosure exists. Misrepresentations have a similar effect.

**§ 183. Conditions that are to avoid the Policy.**—A fire policy, as a rule, enumerates certain matters which



if they occur are to avoid the policy. The more important of these are as follows :—

1. Misdescription or omission of material facts in the proposal. This has been already referred to.

2. Increasing the risk subsequent to the policy by doing anything to the property or to any building in which it is contained.

3. Removing the property without the consent of the company.

4. Assigning the property otherwise than by will, unless the policy be assigned as well.

**§ 184. The Premium.**—The premium is usually payable at the time the insurance is effected ; the policy not being issued until such premium is paid.

Subsequent premiums are payable yearly, a certain number of days of grace being allowed by some offices. A clause is sometimes inserted to the effect that the policy is not to become void notwithstanding the occurrence of a loss by fire within the days of grace allowed, provided the premium be duly paid on or before the expiration of such days. Where no such clause is inserted, inquiry should be made as to the position of an insured during the running of the days of grace.

**§ 185. Occurrence of a Loss.**—A policy requires the insured when the loss occurs to give notice to the company and to deliver within a certain time a statement of the articles destroyed, with an estimate of their value at the time of fire, and to support such statement, if required, by proofs and explanations. A statutory declaration as to the truth of the statement may also be necessary.

Any fraudulent claim, as a rule, vitiates the policy.

An insurance company usually reserves to itself the right to reinstate or replace the property injured instead of paying the value of the damage sustained.

**§ 186. Concurrent Policies.**—An insurer may effect insurances on the same property in several offices. In such a case, apart from any stipulations in the policies, he might recover from any one office, but if one office pays, it is entitled to a contribution from the other offices. A clause

is usually inserted in a policy to restrict the liability of each office to a proportionate amount of the loss, *e.g.* "If at the time of any loss or damage by fire happening to any property hereby insured there be any other subsisting insurance or insurances, whether effected by the insured or by any other persons, covering the same property, the company shall not be liable to pay or contribute more than its rateable proportion of such loss or damage." The apportionment of the loss between several companies is a difficult matter. As a rule, it is undertaken by the insurance offices concerned or is referred to arbitration.

§ 187. **Authorities.**—*The Law of Insurance*, by Mr. Porter, covers all forms—marine, fire, and life. Marine insurance is treated at length by Mr. Arnould, life insurance by Mr. Bunyan and Mr. Crawley, and fire insurance by Mr. Bunyan. Short chapters on the subject will be found in Smith's *Mercantile Law*, and in Mr. Williams' and Mr. Goodeve's works on Personal Property.

## CHAPTER V

### GUARANTEES

**§ 188. Nature of a Guarantee.**—A guarantee is a contract by which one person undertakes to be answerable for the payment of a debt or the performance of an act, in case another person who is primarily responsible fails to pay the debt or to perform the act. The person primarily liable is called the “principal,” and the person who gives the guarantee the “surety.”

As there cannot be an accessory without a principal, a guarantee implies that there is a contract on which a principal is primarily liable, the liability of the guarantee being secondary, *i.e.* arising only on the principal's default. The proper form of a guarantee is, “If A. will not pay you, I will.” Here the writer clearly indicates that payment must be sought from A., and resort is to be had to himself only in case A. makes default. Expressions such as, “If you supply goods to A., I will pay you,” are equivocal, since the words may mean either a guarantee or that a primary liability is undertaken. All the circumstances must then be examined in order to see to whom credit was really given. If, for example, the goods were debited to A., then it is clear that A. was treated as principal.

**§ 189. Form of Guarantee.**—The Statute of Frauds requires a guarantee to “answer for the debt, default, or mis-carriages of another person” to be in writing, signed by the guarantor or his authorised agent, otherwise no action can be brought upon it. Verbal guarantees are not, how-

ever, made void by the statute : if the principal or surety discharges the promise the transaction is good. But if the principal does not discharge the promise, an action cannot be brought against the guarantor. The writing should show the names of the parties and the promise, but the consideration need not be stated in writing provided there is an existing consideration.

**§ 190. Liability of the Surety.**—The surety is liable on the default of the principal, but once the principal has committed a default the surety may be sued at once. In other words, the creditor is not obliged to sue the principal before suing the surety, nor is he obliged to give the surety notice of default having been made, nor need he demand payment from the surety. If the surety desires to secure that the principal shall be sued first, and that he shall have notice given him of any default, and that he is not to be liable until a demand for payment is made, he must secure that suitable provisions are inserted in the guarantee.

The extent of the surety's liability depends upon the terms of the guarantee. The instrument may contain limitations as to amount or as to time. As regards time, a guarantee may be a "continuing" one or not.

**§ 191. Continuing Guarantee.**—A continuing guarantee is one that is not restricted to a single dealing. If A. guarantees the payment of any debt B. may contract in his business, not exceeding £100, A. makes himself liable for any debts not exceeding £100 which B. may from time to time contract in his business. Hence if the guarantor desires to be surety for a single dealing only, he should take care to say so.

**§ 192. Fidelity Guarantee.**—Guarantees are frequently given for the fidelity of a person engaged in an office, or in some employment. Care should be taken to state distinctly whether the guarantee is intended to apply to an appointment to another but similar office. As a rule, any material alteration in the duties of an office or appointment to a new office discharges the surety.

If a surety becomes bankrupt, his estate is liable under the guarantee, and the creditor may prove against it.

§ 193. **Rights of the Surety.**—A surety who discharges the whole or part of the debt has a right of action against the principal for what he has paid with interest. This right of action does not arise directly out of the contract of guarantee, inasmuch as that contract is one entered into between the guarantor and the creditor: the principal is not a party to it. But when a guarantee is given by one man at the request of another, the law treats the payment of the debt by the surety as a payment at the request of the principal, and gives the surety an action against the principal for the amount paid. Where the surety pays the debt, he is entitled to the benefit of all securities which the principal may have given the creditor to secure payment.

Where there are several co-sureties, any one paying the debt has a right to compel the others to contribute their respective shares. This right arises the moment the surety has paid more than his share of the common debt. No contribution arises where the liability of each surety is limited to a given sum, inasmuch as in such a case each is bound to pay that sum and no more. The right exists only where the sureties are bound jointly or jointly and severally. The power of a surety to call on his co-sureties for contribution before he has paid anything, or where he has paid his share only, is doubtful: probably he could call upon them to give him an indemnity against having to pay more than his share.

§ 194. **Discharge of the Surety.**—The guarantee may be void *ab initio*, and have no legal effect. For instance, if the consideration for which it is given fails, or if the creditor alters the instrument of guarantee after its execution in a material point, the surety is discharged.

A guarantee often contains a clause that the surety may revoke it on notice to the creditor. In such a case, notice will always discharge the surety. If the guarantee contains no such clause, the right of the surety to revoke it, depends on the nature of the guarantee. The substitution of a new agreement for the guarantee before breach will discharge the surety from all liability under the old agreement. The death of the surety, though it does not affect the liability

of his estate in respect of past transactions, will operate as a revocation, provided the guarantee could have been determined by notice. If, however, the surety could not have put an end to the guarantee by notice, his liability remains.

The conduct of the creditor may operate as a discharge of the surety. The general rule is, that if the creditor does any act to the prejudice of the surety, the guarantee is at an end. Hence any material variation from the terms of the contract made between the principal and the creditor discharges the surety, on the ground that the surety became surety on the faith of the original agreement. For instance, a building contract provided that three-quarters of the work as finished should be paid for every three months, and the remaining quarter on completion. Payments of more than three-quarters were made without the consent of the sureties before the work was completed, and it was held the sureties for the performance of the work were discharged.

The terms of the agreement between the principal and surety must also be carefully observed or fulfilled else the surety is not liable, *e.g.* a surety for moneys "to be received" by another is only liable for moneys actually received by that other.

A surety is discharged if the creditor without his consent extends the time originally fixed for payment, even though no injury actually accrues to the surety. The agreement to give time must, however, be one that the principal could enforce. We have seen that unless the extension of time given by a creditor to a debtor is supported by a consideration, the creditor is not bound to wait, but may sue at once. In such a case there is an agreement without a consideration, *i.e.* there is no contract. Even if the creditor agrees with the principal to give the surety an extension of time, the surety is discharged, because the right of the surety to pay the debt and sue the principal is affected. The surety by a contract made between himself and the creditor may secure time for payment provided he gives some consideration. Any

negligence of the creditor in doing what he is legally bound to do, by reason of which the position of the surety is made worse, will discharge the surety: for instance, not presenting a bill of exchange for payment when it became due, and the parties liable to pay subsequently became insolvent. A surety, as we have seen, is on payment of the debt entitled to the securities held by the creditor. The creditor is bound to use due diligence in taking care of such securities, and if he lose them the surety is discharged.

The guarantee may also come to an end by payment of the debt by the principal and by release of the debt by the creditor.

When default is made by the principal, the surety should be sued within six years if the guarantee is not under seal, twenty years if it is under seal, otherwise the right of action is extinguished by the Statute of Limitations.

§ 195. **Authorities.** — Smith's *Mercantile Law*; De Colyar on Guarantees.

## CHAPTER VI

### CHARTER-PARTIES AND BILLS OF LADING

§ 196. **Charter-parties and Bills of Lading.**—A merchant who is shipping goods may either ship them as part of a cargo or may hire an entire vessel where the goods are sufficient to fill the vessel. In the latter case the goods may not be his own, as for example where he takes the risk of collecting a cargo from various exporters. Where an entire ship is hired, a formal document embodying the agreed terms is prepared, called a *charter-party*. Where goods are shipped as part of a cargo, the contract may be a verbal one or it may be collected from the notices issued by the shipping company; but on the delivery of the goods on board, a receipt, called a *bill of lading*, is given by the shipowner or his agent, and though this bill of lading is not the contract itself, it is evidence of the contract. A bill of lading contains the conditions upon which the shipowner receives the goods for carriage, and as the form of bill of lading used by every leading company is well known, shippers who send goods to be carried will usually be taken to have agreed to the bill of lading.

By a charter-party the charterer usually secures the use of the vessel and the services of a master and crew for a particular voyage. By a bill of lading the shipper secures a receipt for the goods, which may be endorsed and delivered to another party, who thereby takes the property in the goods and acquires the same rights and liabilities as if it were originally issued to him.



Before examining in detail the usual provisions found in charter-parties and bills of lading, reference may be made to certain general principles that apply to shipowners and shippers, unless there be an agreement to the contrary. This is the more necessary inasmuch as many of the provisions found in charter-parties and bills of lading have for their object the restriction of some legal liability that would be incurred in the absence of such provisions.

**§ 197. Seaworthiness.**—In all contracts for the carriage of goods it is implied that the vessel is seaworthy at the time of loading and at the time of sailing. By “seaworthy” is meant, fit to undertake the particular voyage in question (§ 171). Express stipulations are often introduced into charter-parties relating to seaworthiness, *e.g.* that the vessel is “staunch and strong and well provided with men and mariners” (§ 203).

**§ 198. Despatch.**—The shipowner also undertakes that the vessel will commence and complete the voyage with all reasonable despatch. If the voyage is rendered impossible by obstacles not known to the parties at the time of making the contract, which cannot be removed within a reasonable time, the contract may be repudiated.

In order to avoid liability from perils that cannot be foreseen, a clause is usually introduced specifying certain “excepted perils,” and if delay occurs from such perils the shipowner is not to be liable.

**§ 199. Deviation.**—A shipowner is under an implied warranty that the ship will not deviate from the usual course of navigation except to save life or to protect the vessel or cargo from some imminent peril. Hence a vessel in the absence of the express consent of the shippers cannot deviate to save property or to tow another vessel. Any unauthorised deviation renders the shipowner liable for any resulting loss to the charterer or shipper. A vessel not authorised to deviate in order to tow another vessel did so and was wrecked when towing; the shipowner was held liable to the shippers for the loss of the cargo.

**§ 200. Freight.**—Freight is the amount payable to the shipowner for carriage and delivery of the goods. Freight

is payable at the moment of delivery. The shipowner cannot claim it until he is ready to deliver the goods; the consignee of the goods is not entitled to have them unless he is ready to pay freight.

No freight therefore is payable if the goods are lost on the voyage and are not delivered at the port of destination, but this general rule is usually restricted in charter-parties and bills of lading.

The master of the ship has a lien on the goods carried for the freight, *i.e.* he cannot be compelled to part with them until the freight is paid.

#### CHARTER-PARTIES

§ 201. **Form of Charter-party.**—The following is a form of charter-party:<sup>1</sup>—

LONDON, 5th November 1886.

A. B. and Co. ————— E.C.

##### OUTWARD.

This charter-party is mutually entered into between C. D. and Co. as agents for owners, and Messrs. A. B. and Co. as charterers of the good ship or vessel—

- (a) 'Ajax'; captain, Anderson, now in Hull.
- (b) The vessel is 1395 tons net, British register, guaranteed to be made tight, staunch, strong, coppered in 1886, and in every way fitted for the voyage. Class of vessel is  $\frac{3}{8}$  rds L 11 in French veritas, and is to be so continued throughout the voyage.
- (c) The voyage to be, Liverpool to Yokohama and Hiogo, or so near thereto as the vessel can safely get, where cargo is to be delivered as per bills of lading in the customary manner, so ending the

<sup>1</sup> Smith's *Mercantile Law*, p. 323.

voyage. The vessel to proceed with all safe speed direct to the port of discharge.

- (d) Vessel's hold and cargo capacity are given to charterers for cargo, except only what is customary and necessary for the ship's stores for the above voyage; and owners hereby guarantee the vessel to carry 1850 tons' (of 20 cwt.) weight of cargo (without being overladen), or if this be refused by owners or captain, then charterers have power to deduct the *pro rata* equivalent for such short carrying from owners' account. The weight of cargo to be computed from invoices and from carriers' notes and from bills of lading. Either these original documents or shippers' certificates of such weight to be accepted as absolute proof by the owners.
- (e) The cargo to be taken on board as customary, and to be of lawful merchandise, including gunpowder (in the river), charterers erecting the necessary magazine; specie, kerosine, or similar oils, acids on deck at shippers' risk; also machinery which can be shipped without cutting hatches. The vessel to proceed to any crane as required in loading dock, but any extra expense in loading or discharging packages over three tons' weight to be borne by charterers.
- (f) Charter money to be paid owners is £2058, say two thousand and fifty eight pounds sterling, in full of all port charges, primages, etc. £1000 to be payable abroad, at current rate of exchange, by bills of lading or charterers' order (at their option), to captain on final and true delivery of cargo; balance to be paid here in cash on sailing, less 5 per cent for interest and insurance. Captain to have an absolute lien and charge for freight on cargo, but to have no recourse on charterers for any freight due abroad for bill of lading if not paid; charterers' responsibility to cease as soon as cargo is signed for except for advance due here, and the order (if any) for balance due abroad.

- (g) Loading dock to be ordered by charterers, and to load in the river if required. Vessel to be made ready and proceed to her loading berth as soon as possible on signing of this charter. Provided there is not sufficient water to allow of her leaving the dock fully laden, the loading to be completed in the river.
- (h) Loading days allowed charterers are thirty, with two clear days extra for cleaning; for any used for loading beyond these, £14 per day demurrage to be paid to owners by charterers. Sundays, customs or bank holidays or detention by frost are always excluded throughout this charter-party. Any day or days during which ballast is discharged not to count against charterers. Captain to notify in writing when vessel is in a proper loading berth, as above, with the hold clear and cleaned, vessel painted, rigged, and ready for cargo. When such are complied with, loading days to commence twenty-four hours after such notice has been received by charterers. Lay days not to count before 20th Nov. unless vessel and cargo both ready sooner: and charterers to have the option of cancelling this charter-party if vessel not arrived and ready to commence loading by 5th Dec.
- (i) Mate's receipts to be signed for the cargo as taken on board. On production of these, the bills of lading are to be signed by the captain at charterers' request, at any rate of freight, such bills of lading to be without prejudice to this charter. Captain shall also sign for weight of coal, pig-iron, or cargo when weighed alongside or on board or delivered on official weighing-machine notes. Captain to attend at least once daily at the charterers' office to sign bills of lading.
- (j) Stevedore to be appointed by the charterers. His men are to take on board and stow the cargo under the direction of the master. The master and owners alone to be responsible for stowage of

cargo and trim of vessel. Charterers to charge owners for storage of cargo at the rate of 1s. 4d. per ton in account, owners to pay the usual advertising, printing, and measurer's charges, not exceeding eight guineas. Underwriters' surveyors to settle all disputes as to stowage or draught, and their recommendation or decision to be carried out by captain and owners. Dunnage or mats if required to be provided by the owners.

- (k) Consignment of vessel to be placed in the hands of the agents appointed by the charterers, whom the owners also accept as agents of the vessel at her ports of discharge inwards, the owners paying  $2\frac{1}{2}$  per cent inwards on amount of this charter, and charterers' agents to have the preference outwards. Should the vessel put into any port or ports on the way while under this charter, she is to be consigned to charterers' agents there.
- (l) A brokerage of 5 per cent on this charter is due by owners to B. J. and Co. on signing of the same.
- (m) If any disputes arise, the same to be settled by two London commercial men, each party naming one as an arbitrator, and if necessary the arbitrators to appoint a third. The decision of the majority shall be final, and any party attempting to revoke the submission to arbitration without the leave of a court shall be liable to pay to the other or others as liquidated damages the estimated amount of the chartered freight. It is further agreed that these presents may be made a rule of Her Majesty's High Court of Justice.
- (n) It is also furthermore agreed that the said vessel shall by the owners thereof during the whole of the said voyage be kept tight, staunch, and strong, and well found and provided with men and mariners sufficient and able to navigate the said vessel, and with all manner of rigging, boats, tackle, provisions, and appurtenances whatsoever
- (o) (restraints of princes and rulers, the dangers and

accidents of the seas, rivers, and navigation, fire, pirates, enemies, throughout this charter-party always excepted).

- (*φ*) In the event of war being declared between the nation to which this vessel belongs and any other, the charterers have the option of cancelling the charter before the vessel proceeds to sea, upon indemnifying the owners from all consequences of re-delivering the cargo; and in case the charter be so cancelled, the charterers shall pay to the owners £13 for each and every day which shall elapse between the time of the vessel being in the loading berth and the cancelling of such charter or the final discharge of the cargo (if any) which may have been received on board, whichever last shall happen. For the due performance of the agreement and matters herein contained each of the said parties bindeth himself and themselves, each of the other, in the sum of estimated amount of freight.
- (*q*) Vessel to call at a wharf in the Tees on her way to dock to load some iron, provided the same can be done with safety to vessel and no extra expense be incurred; if the latter, then the same to be paid by the charterers.

An examination of the above form shows that the leading terms may be classed under certain heads:—

§ 202. **The Name of the Ship.**—This must be correctly stated (clause *a*).

§ 203. **Description of Ship.**—A description may be given of the actual condition of the ship, *e.g.* "tight, staunch, strong, coppered in 1886, and in every way fitted for the voyage," or its actual condition may be implied by reference to Lloyd's register. For instance, a representation that the ship is A1 implies that the ship is so classified at Lloyd's. Such a representation amounts to a condition that the ship is so classified at the time the charter-party is entered into (clause *δ*).

§ 204. **The Voyage.**—The port of departure and the port of destination require to be mentioned in order to

describe the voyage. Clauses are often inserted in order to provide for unforeseen circumstances likely to prevent the delivery of the cargo at the port of destination. A usual clause is to require delivery at the destination "or so near thereto as the vessel can safely get." The vessel must, in the first instance, proceed to the destination, but if after waiting a reasonable time she cannot get to the place for unloading, then she may proceed to another place as near thereto as possible. What is a reasonable time depends on circumstances, *e.g.* where the vessel arrives in a tidal river at low tide, she must wait until the tide rises; if a harbour is frozen, she must wait until the ice melts; and if a dock be full, she must wait a reasonable time for a vacancy.

The word "safely" in the clause means safely for the vessel having a cargo on board. Hence if the master finds that he cannot on account of the weight of the cargo reach the port without unloading a part, he is not bound to do so.

Other clauses are often introduced so as to cover any matters likely to prevent the vessel reaching its destination, such as blockades, quarantine, war, ice, an option being given to the master to land the goods at any other port he considers safe (clause *c*).

§ 205. **Capacity of the Vessel.**—Where a ship is registered her "tonnage" is registered at the same time. This term "tonnage" has no reference to weight; it refers to register tons of 100 cubic feet. When weight is referred to, the phrase "tons of 20 cwt." is generally used. A charter-party, as a rule, states the "tonnage" in order to give an idea of the size of the ship. In addition to this, a certain carrying capacity is usually guaranteed, *e.g.* "the owners hereby guarantee the vessel to carry 1850 tons of 20 cwt. weight of cargo without being overladen." The charterer generally stipulates that the weight shall be computed from invoices, carriers' notes, and bills of lading, in order to avoid the necessity of actually weighing the cargo.

The carrying capacity of a ship is often referred to as so many tons "dead weight." The primary meaning of

"dead weight" is simply "weight," but in a charter-party it is often used to denote goods which measure less than 40 cubic feet per ton, and therefore pay freight by weight (clause *d*).

§ 206. **Nature of the Cargo.**—The charterer by law is bound not to ship dangerous goods without notice to the shipowner. Sometimes there is a stipulation to ship only "lawful merchandise," *i.e.* merchandise that can be lawfully shipped. If it is intended to ship any special kind of goods, such as machinery, it is desirable to refer to such goods in the charter-party, and to arrange by whom the extra expense (if any) of getting such goods on board is to be borne (clause *e*).

§ 207. **Freight.**—A charter-party specifies the amount of freight, for what it is payable, how it is payable, and usually gives the shipowner an express lien or charge on the goods carried for the freight.

On the shipment of goods certain charges are usually levied by the port, and a percentage on the freight, called "prime," is payable to the shipowner, who usually allows a part of it to the shipping agent—if the sum paid as freight is to include these or any other charges, a statement to that effect should be inserted. A portion of the freight is usually payable on the vessel sailing, and the remainder on delivery of the goods, either in cash or bills of exchange, *e.g.* "£1000 to be payable abroad, at current rate of exchange, by bills of lading or charterers' order (at their option), to captain on formal and true delivery of the cargo; balance to be paid here in cash on sailing." The payment in advance may be either an advance of freight or a loan, and it is desirable that the charter-party should contain words to show clearly whether the advance is a loan or not, otherwise the rights of the parties will be doubtful. Where it is an advance of freight, such an advance can be insured, and frequently a deduction is made from the amount advanced on account of insurance, *e.g.* "less insurance."

The charterer may give the shipowner an express lien for the freight, *i.e.* a right to retain possession of the goods in case the freight be not paid. At common law a ship-



owner has always a lien for freight, and when an express lien is given in a charter-party the object usually is to limit the extent of the lien, *e.g.* where the lien is not to extend to any freight "due abroad per bill of lading" (clause *f*).

§ 208. **Place of Loading.**—The charter-party contains a statement of where the ship is at the time of making the charter (clause *a*), or mentions where she will be by a certain day. If such place be not the place of loading, there is inserted a clause requiring her "to proceed to a port and there load": in such a case it is the duty of the shipowner to send the vessel to such port with reasonable speed, and by the day named if one be fixed in the charter-party. The charterers may reserve the right to name the dock in which the cargo is to be taken on board or to load in a river (clause *g*).

§ 209. **Time for Loading.**—A certain time, *e.g.* thirty days, is allowed for loading. It is the interest of the charterer that the vessel should be ready to load by the time appointed, and of the shipowner that no delay should occur. The time for loading begins when the ship is ready to load at the place appointed, and the charterer has notice of this fact. The shipowner must always give notice to the charterers of the ship's readiness to load at the place agreed upon. The days allowed for loading are called "lay days" (clause *h*).

§ 210. **Mate's Receipt.**—On delivery of goods to a ship the shipper usually receives a document known as a "mate's receipt." Where goods are sent to the docks by land, the dock company give a "wharfage note" as a receipt, the dock company taking the "mate's receipt" from the ship. The "mate's receipts" are afterwards exchanged for bills of lading signed by the captain (clause *i*).

§ 211. **Expense of Loading.**—In the absence of any agreement to the contrary in the charter-party, the charterer bears the expense of bringing the cargo alongside the vessel. The shipowner's duty is to receive and properly stow the cargo. A person called a "stevedore" is often employed by the charterers to see to the proper stowage of the cargo, but this does not affect the liability of the

shipowner for stowage. In some cases the charterer stows the cargo at the shipowner's risk and expense. Mats or other articles used to protect the cargo from the bottom and sides of the vessel are called "dunnage" (clause *j*).

§ 212. **Consignment of Vessel.**—The parties usually agree on some firm or person who is to act as agent for both the owners of the vessel and of the cargo in the ports to which the vessel proceeds. Sometimes the vessel is consigned to the charterers' agent, and the amount of commission to be paid such agent ought to be fixed by the charter-party (clause *k*).

§ 213. **Brokerage.**—On the signing of a charter-party, a commission is usually paid to the brokers who negotiate the charter-party. The amount is fixed by the charter-party (clause *l*).

§ 214. **Perils Excepted.**—The shipowner is liable, as we have seen, for any damage arising to the goods on the voyage. A charter-party usually excepts damage arising from "restraints of princes and rulers, the dangers and accidents of the seas, fire, pirates, and enemies," etc., and often makes provision for the case of war (clause *o*). The perils usually excepted will be discussed later on (§ 226).

§ 215. **Provision in Case of War.**—If war breaks out between the country to which a vessel belongs and a foreign state, the vessel is liable to capture. Hence if there is a probability of war, provision is often made for cancelling the charter-party (clause *p*).

§ 216. **Additional Clauses.**—Clauses are often inserted providing for arbitration in case of any dispute between the parties (clause *m*), for the payment of a fixed sum in case the charterers withdraw from the contract, and for cancelling the contract where misrepresentations as to the size or state of the vessel have been made by the owners.

## BILLS OF LADING

§ 217. **Definition.**—A bill of lading is a receipt for goods shipped in a vessel signed by the person who

contracts to carry them, and stating the terms on which the goods are to be carried. The bill of lading is not necessarily the contract itself, as that is made before the bill of lading is signed. As a rule, the conditions embodied in a bill of lading on which goods are to be carried by a particular line of vessels are well known, and when a shipper forwards goods for carriage he is supposed to contract with reference to such conditions. A bill of lading, though not the contract, is evidence of the contract.

§ 218. **Form of a Bill of Lading.**—Different trades use different bills of lading. A collection of various forms will be found in the work on Bills of Lading by E. Leggett. The following form used for general produce in the Mediterranean, Black Sea, and Baltic trades is taken from the appendix to Mr. T. E. Scrutton's work on Charter-parties and Bills of Lading.

- (a) Shipped in good order and condition by ———
- (b) in and upon the good steamship ———
- (c) now lying in the Port of ——— and bound for ———
- (d) with liberty to call at any ports on the way for coaling or other necessary purposes
- (e) being marked and numbered as per margin, and to be delivered in like good order and condition at the port of ——— unto ——— or to his or their assigns
- (f) he or they paying freight on the said goods on delivery at the rate of ——— and charges as per margin.
- (g) It is mutually agreed that the ship shall have liberty to sail without pilots; to tow and assist vessels in distress; to deviate for the purpose of saving life; to convey goods in lighters to and from the ship at the risk of the owners of the goods, but at the ship's expense; and in case the ship shall put into a port of refuge for repairs to tranship the goods to their destination by any other steamship.
- (h) The Act of God, Perils of the Sea, Fire, Barratry of the Master and Crew, Enemies, Pirates, Robbers, Arrests and Restraints of Princes, Rulers, and People,

and other Accidents of Navigation excepted. Strandings and collisions and all losses and damages caused thereby are also excepted, even when occasioned by negligence, default, or error in judgment of the Pilot, Master, Mariners, or other Servants of the Shipowner; but nothing herein contained shall exempt the shipowner from liability to pay for damage to cargo occasioned by bad stowage, by improper or insufficient dunnage or ventilation, or by improper opening of valves, sluices, and ports, or by causes other than those above excepted; and all the above exceptions are conditional on the Vessel being seaworthy when she sails on the voyage, but any latent Defects in the Machinery shall not be considered unseaworthiness provided the same do not result from any want of due diligence of the Owners or any of them or of the Ship's Husband or Manager.

- (i) The Shipowner is not liable for Loss or Damage occasioned by Decay, Putrefaction, Rust, Sweat, Change of Character, Drainage, Leakage, Breakage, or any loss or damage arising from the nature of the goods or the insufficiency of packages :
- (j) nor for Land Damage :
- (k) nor for the obliteration or absence of Marks and Numbers
- (l) nor for any loss or damage caused by the prolongation of the voyage.
- (m) The Steamer while detained at any port for the purpose of coaling is at liberty to discharge and receive goods and passengers.
- (n) The goods are to be applied for within 24 hours of ship's arrival and reporting at the Custom-House, otherwise the Master or Agent is to be at liberty to put into lighters or land the same at the risk and expense of the owners of the goods.
- (o) In case of quarantine at any port, the goods destined for that port may be discharged into quarantine depot, hulk, or other vessel, as required for the

Ship's despatch. Quarantine expenses upon the said goods of whatever nature or kind shall be borne by the Owners of the goods.

- (p) In case any part of the within goods cannot be found during the Ship's stay at the port of their destination, they are to be sent back by first steamer at the Ship's risk and expense, and subject to any proved claim for loss of market.
- (q) The Ship shall not be liable for incorrect delivery of packages unless each of them shall have been distinctly marked by the shippers before shipment.
- (r) Should grain or seed be delivered in a heated or damaged condition, and the receivers claim to deduct half-freight upon such damaged or heated portion, it shall be at the Master's option either to allow the same or to be paid full freight upon the quantity shipped according to the Bill of Lading, provided always that no portion of the same has been jettisoned or otherwise disposed of on the voyage, and the quantity allowed exceeds the quantity named in the Bill of Lading.
- (s) General Average payable according to the York-Antwerp Rules.

The Owner and Consignee of the goods and Shipowner mutually agree to be bound by all of the above stipulations, exceptions, and conditions, notwithstanding any custom of the ports of loading and discharging to the contrary.

In witness whereof the master or duly authorised agent of the said ship hath affirmed to the three Bills of Lading,<sup>1</sup> all of this tenour and date, one of which Bills being accomplished, the others are to stand void.

Dated in ——— this ——— day of ——— 189 .

§ 219. "**Shipped in good order and condition.**"—This clause exempts the master from any liability for misdescription of the goods as regards either contents or weight. It amounts to an admission by the shipowner that the packages when shipped were externally in good condition—it does not

<sup>1</sup> See Appendix.

amount to an admission that internally they were in good condition (clause *a*). The words "weight, quality, and contents unknown" are often inserted at the end in order to exclude any liability in respect of weight, quality, or condition.

§ 220. "**In and upon the good steamship.**"—The name of the vessel must be described with substantial accuracy (clause *b*).

§ 221. "**Now lying in the Port of ———, and bound for ———.**"—The port of departure and the destination are specified, so as to define whence, and to where the goods are to be carried. A false statement as to route or destination would probably, if discovered before the vessel sails, entitle the shipper to cancel the contract (clause *c*).

A subsequent clause (*m*) gives the vessel while detained at any port for the purpose of coaling, "liberty to discharge and receive goods and passengers."

§ 222. "**With liberty to call at any ports on the way for coaling or other necessary purposes.**"—It is the duty of the master to proceed on the voyage without deviating from the usual course taken by vessels pursuing a similar voyage (§ 199). Deviation to save property is not allowed, but a master may deviate in order to save life, or to protect the vessel from any danger to the ship or the cargo. The deviation must not be greater than what is reasonably required.

With the object of giving power to deviate, clauses are introduced into bills of lading. The clause under consideration gives power to deviate in order to obtain a supply of coal or for other necessary purposes (clause *d*).

§ 223. "**Being marked and numbered as per margin and to be delivered in good order and condition at the port of ——— unto ——— or to his or their assigns.**"

The packages are usually marked with letters and figures for the purpose of identification. The delivery is to be in good order and condition, *i.e.* in as good a state and condition as when they were received on board. The bill may provide that delivery is to be to the shipper himself, or to his agent, or to bearer, or to order, or to order or assigns. When it provides that the goods are to be

delivered "to order," or "to order or assigns," the shipper may endorse the bill and send it to the person who is to receive delivery, inasmuch as endorsement and delivery transfer the right to receive the goods (clauses *e* and *q*).

§ 224. "He or they paying freight on the said goods on delivery at the rate of —, and charges as per margin" (clause *f*).

Freight is payable at the moment of delivery. The shipowner cannot claim freight until he is ready to deliver the goods: the consignee of the goods is not entitled to have them unless he is ready to pay freight. A subsequent clause (*n*) provides that "the goods are to be applied for within 24 hours of the ship's arrival and reporting at the custom-house, otherwise the master or agent is to be at liberty to put into lighters or land the same at the risk and expense of the owners of the goods."

Sometimes the master is given a lien on the goods "for freight and payments made, if any, or liabilities incurred in respect of any charges stipulated herein to be borne by the owners thereof."

§ 225. "It is mutually agreed that the ship shall have liberty to sail without pilots; to tow and assist vessels in distress; to deviate for the purpose of saving life; to convey goods in lighters to and from the ship at the risk of the owners of the goods, but at the ship's expense; and in case the ship shall put into a port of refuge for repairs, to tranship the goods to their destination by any other steamship."

A pilot is a person taken on board at a particular place for the purpose of conducting a ship through a river, road, or channel, or to or from a port. The first part of the above clause exempts the master from taking a pilot on board as between himself and the shipper, but it must be remembered that in England vessels coming within certain districts are compelled by law to have a pilot on board.

The second part of the clause relating to the towing of vessels and deviation for the purpose of saving life has already been referred to. The next portion of the clause relating to the use of lighters may be very useful where the

master is unable to reach a dock. The part of the clause, however, that calls for chief attention is that which relates to the master's power of transhipment (clause g).

§ 226. "**Excepted perils.**"—If the bill of lading were to stop at the end of clause g, it would amount to an undertaking to carry the goods at the shipowner's risk. If therefore the goods were lost or damaged, the shipowner would be liable, apart from losing his freight, for non-delivery of the goods.

In order to protect himself from such liability, the shipowner stipulates that he is not to be liable for loss or injury from certain specified causes; but even where such causes are specified, the shipowner must take reasonable care to avoid them.

The excepted perils vary in every trade and with every shipowner; the tendency being to increase their number, so as to enable the shipowner to avoid as much liability as possible.

The perils excepted in clause *h* of the policy are:—

1. "*The act of God*," which includes any accident due to natural causes, and such as is not due to, and could not be prevented, by human intervention. A frost is an act of God; but where a captain filled his boiler overnight, and a frost came on and burst the tubes, the goods being thereby damaged, it was held that the accident might have been prevented, and was not due to the act of God.

2. "*Perils of the sea . . . and other accidents of navigation.*"—Perils of the sea is a phrase used to cover any damage to the goods carried, by sea-water, storms, collisions, strandings, occurring to a vessel at sea and arising out of the sea. The damage must result directly from a peril connected with the sea, such as being wrecked, collision with an iceberg, rough weather, and not from perils which, though occurring when the vessel is at sea, are not peculiar to the sea, such as ordinary wear and tear or the bursting of boilers. The master is bound to take all reasonable care to avoid perils of the sea, and if he does not do so, the shipowner will be liable.



3. "*Fire.*"—This exception will protect the shipowner from liability for damage caused by fire.

4. "*Barratry of the master and crew.*"—Barratry is any criminal or fraudulent act on the part of the master of a ship, or the mariners, causing damage to the cargo, *e.g.* boring holes in a ship to scuttle it, breach of port rules resulting in detention of the ship, or fraudulent deviation from the course.

5. "*Enemies.*"—This refers to damage by the enemies of the State to which the vessel belongs during a war.

6. "*Arrests or restraints of princes, rulers, and peoples.*"—This exception does not refer to ordinary legal proceedings, but to the seizure of the vessel by a State, or the ships of a State. For instance, if the vessel is seized whilst running a blockade, it is liable to be confiscated by the squadron that is blockading the port. If France were at war with Germany, and France were to blockade a German port by prohibiting access to it through the presence of a French squadron, an English vessel trying to enter such port would be liable to capture and confiscation.

7. "*Strandings and collisions.*"—Strandings and collisions may be perils of the sea, and therefore come under a former heading, but in some cases they would not be regarded as perils. The proviso exempts the shipowner from liability even when the stranding or collision is "occasioned by negligence, default, or error of judgment of the pilot, master, mariners, or other servants of the shipowners."

All the above exceptions are subject to the following limitations:—"Nothing herein contained shall exempt the shipowner from liability to pay for damage to cargo occasioned by bad stowage, by improper or insufficient dunnage<sup>1</sup> or ventilation, or by improper opening of valves, sluices, and ports, or by causes other than those above excepted; and all the above exceptions are conditional on the vessel being seaworthy when she sails on the voyage."

**§ 227. Damage excepted.**

"Loss or damage occasioned by decay, putrefaction,

<sup>1</sup> Provision to protect the goods from damage by contact with the bottom or sides of the vessel.

rust, sweat, change of character,<sup>1</sup> drainage, leakage,<sup>2</sup> breakage, or any loss or damage arising from the nature of the goods or the insufficiency of packages" (clause *i*).

This clause protects the shipowner from liability arising from the nature of the goods, or the insufficiency of the packing, provided the goods have been stowed with reasonable care.

"*Land damage*," *i.e.* damage arising after the goods are landed, is also an exception (clause *j*).

§ 228. "**Obliteration of marks or numbers**" may cause the goods to go astray, their identity being, it may be, destroyed. For this the shipowner takes no liability (clause *k*).

A further clause (*g*) provides that the ship shall not be liable for incorrect delivery of packages unless each of them shall have been distinctly marked by the shippers before shipment.

§ 229. "**Loss or damage caused by the prolongation of the voyage.**"—The shipowner cannot foresee what will be the length of the voyage, and therefore undertakes no liability for damage to perishable articles through the voyage being prolonged (clause *l*).

§ 230. **Quarantine.**—Provision is usually made to protect the shipowner from liability in case the ship is prevented from entering the port by quarantine regulations. A vessel coming from a port at which cholera or certain other infectious diseases prevail, is generally isolated for a certain time at any port at which she calls (clause *o*).

§ 231. **Demurrage.**—This term is used to denote an agreed sum that the charterer is to pay for any delay beyond the time stipulated for loading or unloading. For example, the clause "ten days for loading, and demurrage at £20 per day afterwards," means that if a longer period than ten days be taken for loading or unloading, the charterer is to pay the shipowner £20 per day for every additional day.

<sup>1</sup> *e.g.* by fruit becoming over-ripe.

<sup>2</sup> But the shipowner will remain liable for damage to goods from the leakage of other goods.

Where no sum is agreed, the shipowner has a claim for damages for detention, though the term demurrage is often used to cover such claim for damages.

Demurrage begins to run when the days allowed, called lay-days, have expired. The lay-days begin when the ship arrives at the agreed place for loading or unloading, and is ready to load or discharge. It is usual to except from the lay-days Sundays and holidays, otherwise such days would count.

If no time be fixed for loading or unloading, the law implies that a reasonable time is allowed, and if such time be exceeded, either demurrage or damages for detention is payable. A bill of lading may contain a stipulation as to demurrage (clause *n*), and every bill of lading implies that the goods will be unloaded within a reasonable time.

§ 232. **General Average.**—Where an extraordinary loss is incurred for the preservation of the ship and cargo, all who are interested in such preservation must contribute to the loss. This claim gives rise to a general average contribution. When, for example, cargo is thrown overboard to save the ship, or is injured by water in putting out a fire, or sold to raise money to carry out necessary repairs, or where masts or tackle are cut away to right the ship, all parties concerned must contribute to the loss.

The parties interested are (1) the shipowner or charterer, who desires to save the ship and earn the freight, and (2) the cargo-owner. The master is the one to collect the contributions, but as a rule the amounts to be paid are adjusted at the termination of the voyage by specialists, called average adjusters. Certain rules, known as the York-Antwerp Rules, relative to general average are often incorporated in a bill of lading (clause *s*).

§ 233. **Salvage.**—Where a ship and cargo are saved from loss or damage by the efforts of another vessel, the captain and crew of such other vessel are entitled to a payment known as salvage. The ship and the cargo contribute separately, as the ship is not obliged to contribute for the salvage of the cargo, and *vice versa*. Where life is saved, the ship or the cargo, or both if also saved, may have

to contribute life salvage. Where the amount to be paid cannot be agreed upon, it will be fixed by the Admiralty Court.

§ 234. **Bottomry.**—Money is sometimes advanced to the master of a ship upon the security of the cargo, upon the condition that it is only to be repaid if the ship reaches its destination safely. The document embodying such an arrangement is called a bottomry bond. The master has no power to raise money in this way unless no other course is open. If, for example, he could borrow on his own personal credit or on that of the shipowner, he is not justified in resorting to a bond. The money must be borrowed in the interests of the cargo, *e.g.* to enable the cargo to be carried in safety: the bond, in other words, must be one that is beneficial to the cargo-owner. If communication with the cargo-owner is possible, the master must wait his instructions; but if no instructions are sent within a reasonable time, he may raise the money. No more must be borrowed than is necessary, as the nature of the contract necessitates the payment of a high rate of interest.

§ 235. **Powers and Duties of the Master.**—Reference has been made in the preceding sections to the acts of the master of a vessel. It may be convenient to bring together some of his more important powers.

Primarily the master is the agent of the shipowner: necessity may make him the agent of the cargo-owner. In the absence of express instructions, the master ought always to communicate with the shipowner or the cargo-owner and take their instructions: when this is impossible he can act himself. But under such circumstances whatever he does he must be prepared to justify on the ground of necessity, it is not sufficient that he act in good faith.

The master of a ship as the agent of the shipowner is bound to do everything necessary to carry out the contract or contracts made between the shipper or shippers and the shipowner. From this principle flow both his powers and his duties.

As agent of the shipowner the master may—

1. Deviate from the usual course in order to protect the ship and cargo from imminent peril.
2. Tranship the goods into another vessel where he is prevented through excepted perils from completing the voyage.
3. Throw overboard a part of the cargo in case of necessity.
4. Make a salvage agreement on behalf of the ship.

As agent of the cargo-owner the master may—

1. Sell damaged goods where this is the wisest course, provided he cannot communicate with the cargo-owner.
2. Borrow money on the security of the cargo in case of necessity.
3. Make a salvage agreement on behalf of the cargo.

**§ 236. Authorities.**—*Charter-parties and Bills of Lading*, by T. E. Scrutton, contains a concise digest of the law. The standard treatises on shipping by Mr. Abbott and Mr. Maclaghlan discuss the subject in detail. A shorter account will be found in Smith's *Mercantile Law*.

## CHAPTER VII

### BILLS, NOTES, CHEQUES, AND I.O.U.S

§ 237. **Mercantile Instruments.**—The greater portion of mercantile transactions are carried out by means of credit. Whenever a seller of goods, instead of taking cash at once in payment, gives time for payment, he is said to give credit. Custom has made usual the use of documents or instruments by which the buyer promises to pay the debt. The chief credit instruments are bills of exchange and cheques, but promissory notes and I.O.U.s are also met with.

### BILLS OF EXCHANGE

§ 238. **Form.**—A bill of exchange is a written promise to pay a sum of money on demand or at the expiration of a given time.<sup>1</sup> The person who gives the promise is called the acceptor, the person to whom the promise is given is called the drawer. Every bill of exchange may, like other contracts, be resolved into a proposal and an acceptance. The proposal takes the following form :—

<sup>1</sup> The following definition is given in the Bills of Exchange Act 1882: "A bill is an unconditional order given in writing, addressed by one person to another, signed by the person granting it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a certain sum in money to the order of a specified person or to bearer."

LONDON, 1st January 1893.

**£1000**

One month after date pay to my order One Thousand Pounds.

To C. D.

A. B.

This form is merely a request or proposal made by A. B. to C. D., asking C. D. to pay £1000 one month after the 1st January 1893. C. D. by writing the word "accepted" across the bill and signing his name and delivering the bill to the drawer, undertakes to comply with the request, and if the bill be duly stamped, a valid contract arises between the parties.

§ 239. **Inland and Foreign Bills.**—Bills of exchange are either inland or foreign. An inland bill is one which is or purports to be both drawn and payable within the British Islands. Any other bill is a foreign bill. A foreign bill usually consists of a set of three bills, each bill being numbered and containing a reference to the other bills. These bills being transmitted separately, the risk of losing the bill is greatly diminished, as any one bill of the set being paid, the other two bills of the set are of no use.

The following is a form of a foreign bill :—

LONDON, 1st January 1893.

**For Rs. 550.**

At sixty days after sight of this first of exchange (second and third unpaid), pay to the order of C. D. Five hundred and fifty rupees value received of them, and place the same to account.

To E. F.

A. B.

§ 240. **Amount.**—The amount is usually specified in figures on the upper left-hand corner, and in writing in the body of the instrument.

§ 241. **Stamp.**—A bill, if drawn and made payable in the

United Kingdom, should be stamped with the proper stamp, *i.e.*—

Where it does not exceed £5	.	.	1d.
Where it exceeds £5 and does not exceed £10	.	.	2d.
" £10	"	£25	3d.
" £25	"	£50	6d.
" £50	"	£75	9d.
" £75	"	£100	1s.
For every £100, and also for every fractional part of £100	.	.	1s.

If the bill is payable on demand, and the amount of the stamp is 1d., an adhesive stamp may be used: in all other cases an impressed stamp is required. A bill drawn abroad requires no stamp, unless it is expressed to be payable, or is endorsed or paid, in the United Kingdom. Any person issuing, endorsing, transferring, or paying a bill not being duly stamped, is liable to a penalty of £10, and the person taking the bill cannot recover on it.

§ 242. **Date.**—A bill should be dated, but if not dated it is not invalid, as it is regarded as dating from the time it was issued, *i.e.* from the date of delivery of the bill by the acceptor to the drawer.

§ 243. **The Time for Payment.**—The parties may, in the bill, fix a time for payment, which may be at the expiration of a given time from the date of the bill, as in the first example above given. The time may be fixed with reference to the presentation of the bill to C. D. for payment, or it may be when payment is demanded. If no time be fixed, the bill is payable on demand.

Though a bill need not be presented for payment in order to charge the acceptor, it must be so presented to charge the drawer or an endorser. If the bill be payable on demand, it should be presented within a reasonable time after its issue; if not payable on demand, then presentment should be made on the day it is due, three days of grace being added to the time of payment, the bill being regarded as due on the last of these days. If the last day of grace falls on Sunday, Christmas Day, or Good Friday, the bill is payable on the previous day: if the last day is on a bank holiday (other than Christmas Day and Good Friday), or if



the last day of grace is a Sunday, and the previous day is a bank holiday, the bill is payable on the succeeding business day.

**§ 244. The Place of Payment.**—It is desirable that the parties should specify the place of payment. If no place be specified, but the acceptor's address is given in the bill, it is payable at such address. The acceptor may fix the place of payment when accepting, but in order to do so he must not only accept the bill to pay at a particular place, but state that it is to be paid there and nowhere else.

If no place of payment or address be given in the bill, the place of payment is the place of business of the acceptor, if known, but if not known, then his ordinary residence. If neither his place of business nor his ordinary residence be known, the place of payment is wherever he can be found, or his last known place of business or residence.

**§ 245. The Position of the Acceptor.**—The acceptor engages to pay the bill. If, however, he has accepted with certain qualifications, *e.g.* as to time, or place, or amount, he is only bound to pay subject to such qualifications. As far as the acceptor's liability is concerned, he is not entitled to any presentation of the bill for payment, or any demand of the money due. It is, however, usual and desirable to present a bill for payment when due. If the bill be not paid by the acceptor, it is said to be dishonoured.

**§ 246. Transfer.**—A bill of exchange may be transferred by the holder unless it contains words prohibiting any transfer. A bill payable to bearer is transferred by delivery: a bill payable to order is transferred by endorsement of the holder, followed by delivery. The transfer of a bill payable to bearer by delivery without endorsement imposes no liability on the transferor, but a transfer by endorsement and delivery imposes important duties on the parties, and it is therefore necessary to examine the position of the drawer, of the endorser, and of the holder.

**§ 247. Position of the Drawer.**—Where the amount is payable to the drawer, he has only to receive the amount. But if the amount is payable to a third party, the drawer, in case the bill be not paid by the acceptor, is liable to pay the

amount to the third party or the holder. The drawer may also, by endorsing a bill, become liable to the holder. His liability, however, is in every case subject to the conditions that the bill be presented for payment, and that if not paid, notice of such non-payment (called notice of dishonour) be duly given to him. Presentation of the bill for payment, though, as we have seen, it cannot be required by the acceptor, is all important as regards the position of a third party, into whose hand the bill comes. A holder (other than the drawer) cannot, in case of non-payment by the acceptor, make the drawer liable unless he has presented the bill for payment to the acceptor. Not only must the holder present the bill for payment to the acceptor, but if it is not duly paid he must at once give notice of the non-payment to the drawer. Such notice must be given within a reasonable time. If the parties live in the same place, the notice should reach the drawer the day after the day of dishonour: if the parties live in different places, notice should be posted the day after the day of dishonour.

**§ 248. Position of an Endorser.**—The person to whom the drawer endorses a bill may in turn transfer it by endorsement and delivery to some one else. The question then arises what is the position of an endorser. The rule is that every endorser of a bill is in the nature of a new drawer, and is liable to every subsequent holder in default of payment by the acceptor. This liability is subject to the rules already referred to relating to presentation for payment and notice of dishonour.

**§ 249. Position of the Holder.**—The holder is the person in possession of the bill. The law presumes that a bill is given for a sufficient consideration, but it is open to any party sued on a bill to show that there was no consideration given. For example, if A. by way of doing B. a favour accepts a bill drawn by B., and B. brings an action against A., it is open to A. to show that B. gave him no consideration for the bill, and in such a case B. cannot recover. If, however, the holder took the bill before it was due in good faith, and gave value for it, and had no notice of any defects in title, it will be immaterial that the bill

was given originally without any consideration. For instance, if B. in the above case discounts the bill with C., then C. can sue A. for its amount. The holder cannot sue on a forged bill. In order to protect himself, the holder must be careful to present the bill when due at the proper place, and if it be dishonoured, to give notice to the drawer and every endorser. In the case of a foreign bill the dishonour should be noted by protest. The protest should be made by a notary public at the place where the dishonour occurs. The protest is a solemn declaration signed by the notary containing a copy of the bill and specifying amongst other things the reason of protesting, and place and date of protest, as well as the name of the person at whose request the bill is protested. The protest will be good evidence of the dishonour of the bill in case an action is brought in a foreign court.

§ 250. **Example.**—An example summing up the different rules may now be given.

A. B. is the drawer.

C. D. the acceptor.

E. F. the person to whom A. B. transfers the bill.

G. H. the person to whom E. F. transfers the bill.

G. H. becomes the holder, and if the bill has been transferred by endorsement and delivery, A. B., C. D., and E. F. are endorsers.

C. D. is bound to pay the bill whether it be presented or not.

A. B. is bound to pay G. H. the holder if C. D. does not pay, provided G. H. has presented the bill for payment and has given A. B. notice of non-payment.

E. F. is also liable to pay G. H. in case of non-payment by C. D., provided the bill was duly presented for payment and notice of dishonour given to him.

G. H. if not paid by C. D. may proceed against either C. D., A. B., or E. F., provided he has presented the bill for payment and given notice of dishonour, but he can only recover the amount of the bill and the costs to which he has been put. As a rule he will sue all parties at one and the same time.

## CHEQUES

§ 251. **Definition.**—A cheque is an order given to a bank by a customer requesting the bank to pay a sum of money to the person named or to the bearer on demand.<sup>1</sup>

A cheque differs from a bill of exchange in several points.

A bill requires to be accepted in order to charge the acceptor; a cheque is never accepted by a bank, and the holder has no remedy against the bank in case of dishonour. A bill must be presented for payment in due time, otherwise the drawer is discharged; failure to present a cheque in due time does not discharge the drawer unless the bank fails. In the case of a bill, notice of dishonour must usually be given; in the case of a cheque this is rarely necessary, as the want of effects excuses such notice.

§ 252. **"And Co." "not negotiable."**—It is not unusual to write across a cheque the words "and Co." between two transverse lines; these words amount, though two transverse lines without any words are sufficient, to a direction by the drawer to his bank to pay the cheque only when it is presented for payment by another bank. If a bank be specified, payment can be obtained only through that bank.

The words "not negotiable" may also be written across a cheque. Where a crossed cheque bears the words "not negotiable" the holder takes no better title than the person had from whom he took it.

The holder of an uncrossed cheque may cross it, and the holder of a crossed cheque may add the words "not negotiable."

§ 253. **Duty of Bank.**—A bank is bound to honour a customer's cheques so long as there is a balance to the credit of such customer's account. This results from the implied contract entered into between the bank and the customer when an account is opened. Notice of the death

<sup>1</sup> The Bills of Exchange Act 1882 defines a cheque as a bill of exchange drawn on a banker payable on demand.

of a customer determines the authority of a bank to pay cheques drawn by such customer before his death.

§ 254. **Presentation of Cheques.**—A cheque should be presented for payment within a reasonable time, as the holder by delay takes the risk as regards the drawer of the failure of the bank, and an endorser after unreasonable delay will be discharged from liability. By reasonable time is meant the day after the cheque has been received. Where it has to be sent by post to an agent for collection, it should be posted not later than the day after it is received, and the agent should present it not later than the day after he receives it.

§ 255. **Promissory Notes.**—A promissory note is a promise in writing by which one person undertakes to pay another a certain sum of money. Delivery of the note by the maker to the other person is essential to make the note complete, and the note should be stamped with the proper stamp. The money may be made payable on demand or at a fixed time. The person to whom the money is to be paid may be a specified person or the bearer. The following is a form :—

LONDON, 1st January 1893.

£100

On demand [*or at sight, or*      days after sight, *or*  
days after date, *or on the*      day of      ] I promise to  
pay C. D. [*or C. D. or order, or C. D. or bearer, or*  
bearer] one hundred pounds.      A. B.

A bank-note is an example of a promissory note in which the promise is given by a bank.

The maker of the note promises to pay it: no presentation for payment is necessary to charge him, but such presentation is necessary to charge an endorser if the note has been endorsed.

§ 256. **I.O.U.s.**—An I.O.U. is an acknowledgment of a debt, such acknowledgment implying a promise to repay the money.

The following is the usual form :—

1st January 1893.

A. B.

I.O.U. £100.

A. B.

No stamp is required, but if any words are added to show that the money is to be paid on a given day or even on demand, the I.O.U. becomes a promissory note, and a stamp is necessary.

An I.O.U. is not negotiable.

§ 257. **Authorities.** — The law relating to bills of exchange has been embodied in an Act of Parliament. Byles on Bills, or Chalmers on Bills, contains the Act with notes. *Practical Banking*, by T. B. Moxon, can be recommended to those engaged in banks.

## PART IV

### BANKRUPTCY

**§ 258. Principle involved.**—The law of bankruptcy is based on the principle that if a person is unable to pay his debts in full, his property should be taken to satisfy his creditors as far as it will go, he himself being discharged from any further liability in respect of such debts. The first English statute on the subject was directed against fraudulent debtors. Subsequently bankruptcy was restricted to traders, but now any person (with some exceptions), whether a trader or not, may take advantage of the bankruptcy laws.

**§ 259. The Board of Trade.**—The Board of Trade is entrusted with very important powers and duties in all cases of bankruptcy. All moneys received by a trustee are paid into an account kept by the Board with the Bank of England, called "The Bankruptcy Estates Account," except when the committee of inspection (§ 269) or the Board of Trade think it desirable to have the money paid to a local bank. Any local account has to be kept in the name of the debtor's estate.

The Board of Trade appoints the official receivers (§ 264) and other officers. It has also power to issue general orders of an administrative character; and may alter the form of all official documents not of a judicial nature.

**§ 260. Acts of Bankruptcy.**—Proceedings in bankruptcy are commenced by a creditor presenting a petition in the proper court alleging that the debtor has committed an “act of bankruptcy.” The following are acts of bankruptcy :—

1. Where the debtor departs out of or remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house, with the object of defeating or delaying his creditors.
2. When he assigns his property to trustees for the benefit of his creditors generally ; or
3. Assigns his property or part thereof with the object of defrauding or defeating or delaying his creditors.
4. Where he assigns his property or part thereof, or creates any charge with the object of fraudulently benefiting one or more of his creditors at the expense of the others.
5. Where he files in court a declaration of inability to pay debts.
6. Where he permits an execution to be levied by seizure of his goods under an order of the court, and the goods are sold or held by the sheriff for twenty-one days.

When judgment is recovered in an action, if the amount claimed be not paid, the creditor issues execution, *i.e.* he sets the sheriff in motion, and the sheriff seizes the goods of the debtor, and holds them until the debt is paid or sells them.

7. A creditor who obtains judgment may serve the debtor with a notice requiring him to pay, and if he does not do so within a given time, he commits an act of bankruptcy.
8. Where the debtor gives notice to any of his creditors that he has suspended or is about to suspend payment of his debts.

**§ 261. Who may be made Bankrupt.**—Any person who can enter into a binding contract may, as a rule, be made bankrupt. A person under twenty-one years cannot



be made bankrupt since he cannot make binding contracts except for necessities. A married woman may be made bankrupt where she can contract as if she were a single woman, *e.g.* where she carries on trade in the city of London. And a married woman carrying on trade in respect of her separate estate (§ 45) may be made bankrupt in respect of such separate estate. But if she is not carrying on trade, she cannot be made bankrupt though she possesses separate estate.

**§ 262. Who can petition.**—A person may petition to have himself adjudicated a bankrupt, but as a rule a petition is presented by a creditor who cannot obtain payment of his debt. The following conditions must be fulfilled in order to enable a creditor to petition :—

- (a) The debt due must be at least £50.
- (b) The debt must be an ascertained amount. The price of goods bought is ascertained, but a claim for damages is unascertained.
- (c) The debt must be payable immediately or at some certain future time.
- (d) The act of bankruptcy must have occurred within three months before the presentation of the petition.
- (e) The debtor must reside in England, or within a year before the presentation of the petition have resided or had a place of business in England.

**§ 263. Order of Adjudication.**—When the petition is presented by a creditor, the court requires proof of the debt and of the act of bankruptcy. It must also be shown that the debtor had notice of the petition. If the court is satisfied that an act of bankruptcy has been committed, it will make a “receiving order,” which has the immediate effect of making the official called the “official receiver” the receiver of all the property of the debtor, with certain exceptions, and deprives the creditors of power to bring any actions against the bankrupt for their debts.

**§ 264. The Official Receiver.**—The Board of Trade has appointed a number of official receivers, who have important duties to discharge. The debtor is always examined by an official receiver, who makes a report to the

court on the debtor's conduct, and especially as to whether the debtor has done any act that would justify the court in refusing, suspending, or modifying an order for discharge (§ 275).

Pending the appointment of a trustee (§ 268) or special manager, he has charge of all the property of the debtor; he summons and presides at meetings of creditors; and he makes a report to the creditors on any proposal of the debtor regarding the payment of the debts.

**§ 265. Special Manager.**—Where it is necessary in the interests of the estate that a special manager should be appointed, the official may make such appointment on the application of any creditor. The special manager has to give security for the performance of his duties, and may be removed by the official receiver. The creditors may require his removal. If it is necessary for the special manager to raise money to carry on the business, he must get the assent of the official receiver.

**§ 266. Public Examination of the Debtor.**—When the court makes a receiving order, it appoints a day for the examination of the debtor, and the debtor is required to attend. The debtor is also required to furnish the official receiver with a statement of affairs showing the particulars of the debtor's liabilities, debts, assets, the names and addresses of the creditors, the securities (if any) held by them, and any other information the official receiver may require. At the public examination questions may be put by the official receiver or by any creditor who has tendered a proof of a debt (§ 270). The evidence of the debtor is taken on oath, and the examination cannot be declared closed until after the first meeting of creditors.

**§ 267. First General Meeting.**—Within fourteen days after the receiving order is made, a general meeting of creditors, at which the debtor must be present, is called by the official receiver. Each creditor is entitled to have sent him a summary of the debtor's statement of affairs, accompanied by any observations the official receiver may think fit to make. The creditors at this meeting may resolve that the debtor be adjudged a bankrupt, or may agree

to accept a scheme put forward by the debtor (§ 279). The resolution in favour of bankruptcy must be carried by a majority "in value" of the creditors present, personally or by proxy, *i.e.* each vote is estimated at the amount of the debt due to the voter. The court will subsequently adjudge the debtor bankrupt, and thereupon his property becomes available for the payment of his debts.

**§ 268. The Trustee.**—When the creditors have resolved that the debtor be adjudged bankrupt, the creditors may appoint a fit person to be trustee of the property of the bankrupt, but they may leave the appointment to the committee of inspection (§ 269). Until the trustee is appointed the official receiver acts as trustee. If the creditors do not appoint a trustee, the Board of Trade may appoint, but a trustee subsequently appointed by the creditors will displace the trustee appointed by the Board of Trade.

On his appointment all the property of the bankrupt passes to the trustee. The chief duties of the trustee are to take possession or get in all the debtor's property liable for payment of his debts, to keep books and accounts, to pay all moneys received into the Bank of England, and to declare and pay dividends from time to time.

The chief powers of the trustee are to get in all the property of the bankrupt, to sell any part of such property, to hold property, to make contracts, to give receipts, to prove in bankruptcy when the bankrupt is a creditor, and to summon meetings of the creditors. The powers he can exercise with the consent of the committee of inspection are enumerated in another section (§ 269).

**§ 269. The Committee of Inspection.**—The creditors may appoint a committee of their own number qualified to vote, of not less than three and not more than five, to be a "committee of inspection." The duty of such committee is to superintend the administration of the bankrupt's estate by the trustee, and to give directions to the trustee subject to the views of the creditors assembled in general meeting.

The committee are entitled to see the record and cash books kept by the trustee, and once in every three months it is to audit the cash-book. The trustee requires the

consent of the committee to employ a solicitor, to mortgage the property of the bankrupt, to carry on the business, to sue for debts, to refer disputes to arbitration, to compromise any debt or claim between the bankrupt and third parties, to compromise debts and claims provable, or to divide property amongst the creditors in specie.

**§ 270. Proof of Debts.**—Before a claim is admitted against the estate of the bankrupt, the creditor must prove it by sending to the official receiver an affidavit or sworn declaration that the debt is due, full particulars of such debt being given. The official receiver hands over all proofs to the trustee to examine. Within twenty-eight days after receiving a proof, the trustee must state in writing whether he admits or rejects it. A creditor whose proof is rejected may appeal to the court, and when a proof is accepted the trustee, and in some cases a creditor, may ask the court to expunge it. Only debts proved are entitled to be paid out of the assets, and, as a rule, only creditors who have proved their debts can vote at meetings.

**§ 271. Secured Debts.**—A creditor may have his debt “secured.” For instance, the debt may be £1000, and the creditor may have a mortgage on part of the debtor’s property. Where a secured creditor proves his debt, he must give particulars of the security he holds and state its value. The trustee may call on the creditor to give up his security for the benefit of the estate, on being paid its estimated value with an addition of 20 per cent. At meetings he is entitled to vote only in respect of the balance, if any, due to him after deducting the value of the security. Suppose, for example, in the above case the mortgage is only worth £750, then the creditor’s voting power is represented by £250.

**§ 272. Property available for paying Debts.**—

1. All the bankrupt’s moveable property, wherever situate, except the tools of his trade, the wearing apparel and bedding of himself, his wife, and his children, not exceeding £20 on the whole.
2. All the bankrupt’s immoveable property, *e.g.* land, or leaseholds, situate in Her Majesty’s dominions.

Immoveable property situate in foreign countries will pass to the trustee when the bankrupt makes a conveyance to him.

3. All goods that belong to other persons, but which at the commencement of the bankruptcy are in the possession, order, or disposition of the bankrupt under the following conditions :—
  - (a) The goods must be in his possession in the course of his trade or business.
  - (b) They must be in his possession by consent of the owner.
  - (c) The possession must be under such circumstances that the bankrupt is the reputed owner.

The principle on which such goods are made liable is that persons are led to give credit to the bankrupt because he is supposed to be owner of the goods.

4. Property that the bankrupt has professed to assign away to others previous to the bankruptcy, in a manner not recognised by law, where bankruptcy ensues. Where property is conveyed by a person who receives no consideration for it, and such person becomes bankrupt within two years, the trustee may recover the property for the creditors ; and if he becomes bankrupt subsequently within ten years from the date of the conveyance, the trustee can recover the property, unless the bankrupt shows that at the time of the conveyance he was perfectly solvent. Any settlement of property outside of such ten years may be set aside if it was fraudulent, *i.e.* made to delay or defeat creditors.

§ 273. **Disclaimer of onerous Property.**—If any portion of the bankrupt's property is burthened with onerous covenants, or consists of stocks or shares in companies, or of unprofitable contracts, or of any other property that is unsaleable by reason of its binding the possessor to the performance of onerous acts, the trustee may, instead of accepting the same, disclaim it, and thereupon he is discharged from any liability in respect of the property. A lease, for example, binds the lessee to pay rent, to repair,

to insure, etc., and the trustee who accepts the lease will find himself bound to perform all these covenants. The disclaimer must take place within three months after the trustee is appointed, or within two months after he first becomes aware of the existence of the property. In the case of leases, the consent of the court is necessary for disclaimer, except in certain cases.

**§ 274. Payment of Dividends.**—The first charge on the estate of a bankrupt is the expense of administering the estate, and it is the duty of the trustee to retain out of the assets an amount sufficient to meet such expense. Subject to this, the trustee is required to declare and distribute dividends amongst the creditors who have proved their debts.

The first dividend should be distributed within four months after the conclusion of the first meeting of creditors, unless the committee of inspection are satisfied that there is good ground for postponing such distribution. Subsequent dividends are to be declared and distributed at intervals of not more than six months.

When all the property has been realised, a final dividend is declared. Notice of the intention to pay a final dividend is given to those creditors who have not established their claim, and if they fail to establish their claim to the satisfaction of the trustee within a fixed time, they are excluded from the distribution.

**§ 275. Discharge of Bankrupt.**—A bankrupt may at any time apply to the court for his discharge. The court, on hearing the application, will take into account the report of the official receiver on the conduct of the bankrupt. In this report the official receiver is required to state whether the bankrupt has committed any criminal act under the Debtors Act of 1869, or any act that would justify the court in refusing, suspending, or qualifying the order of discharge. The court is bound to refuse the discharge if any such criminal act has been committed; and it is bound, except where for special reasons it otherwise determines, either (a) to refuse the discharge, or (b) to suspend it for not less than two years, or (c) to suspend it until a dividend

of at least 10s. in the £ be paid, or (d) to require the bankrupt to consent to judgment being entered against him for any balance of debts not paid at the date of the discharge, such balance to be payable out of future earnings, in the following cases :—

1. Where the assets are not sufficient to pay 10s. in the £, unless this is due to circumstances for which he is not responsible.
2. Where he omitted to keep proper books of account during the three years preceding his bankruptcy.
3. Where he continued to trade knowing he was insolvent.
4. Where he contracted a debt without having reasonable ground of expecting to be able to pay.
5. Where the bankruptcy was due to rash and hazardous speculation, or to unjustifiable extravagance in living.
6. Where he put any creditor to unnecessary expense by a frivolous or vexatious defence to an action.
7. Where he, within three months of the date of the receiving order, being unable to pay his debts, gave an undue preference to any of his creditors.
8. Where he has been bankrupt previously, or made a composition with his creditors.
9. Where he made a fraudulent settlement of his property.

§ 276. **Effect of an Order of Discharge.**—The order of discharge releases the bankrupt from all debts provable in the bankruptcy, with certain exceptions, such as debts due to the Crown, or debts incurred by fraud to which he was a party. In respect of all discharged debts no action can be brought against him. The discharge will not affect his liability to any criminal prosecution, and he is liable to be prosecuted for any of the offences mentioned in the Bankruptcy Acts. An undischarged bankrupt who obtains credit to the extent of £20 from any person without informing such person that he is an undischarged bankrupt is liable to be prosecuted.

§ 277. **Disabilities of a Bankrupt.**—Bankruptcy dis-

qualifies the bankrupt from holding the office of mayor, alderman, councillor, guardian, member of a sanitary authority, school board, or vestry. He cannot sit or vote in the House of Lords, or be elected to the House of Commons. If a member of the House of Commons becomes bankrupt, and the disqualification is not removed within six months, the seat becomes vacant. These disqualifications cease (1) where the adjudication of bankruptcy is annulled, (2) when the court, on granting his discharge, certifies that the bankruptcy was caused by misfortune.

A bankrupt cannot act as a trustee, but may act as an executor.

**§ 278. Annulment of Adjudication.**—The court will always annul an adjudication where the order ought not to have been made, and if a debtor pays his debts in full, or the creditors accept a scheme of arrangement, the adjudication may be annulled.

All acts done by the official receiver or trustee previous to the annulment are valid.

**§ 279. Composition or Scheme of Arrangement.**—Before the court orders a person to be adjudicated a bankrupt, the creditors may agree to a scheme of arrangement of the debtor's affairs. The debtor may, for example, offer to pay by instalments 10s. or 15s. in the £ to his creditors, and may give security for payment of the same. If such scheme be accepted, the receiving order (§ 263) will be rescinded. The resolution accepting the scheme must be adopted not only by a majority in number, but by three-fourths in value of the creditors present, personally or by proxy, and voting at the meeting, and be subsequently confirmed by a resolution passed by a majority in number representing three-fourths in value all the creditors who have proved and been approved by the court. Before the court will give its approval the official receiver must make his report on the scheme. After approval the receiving order is rescinded, and the debtor is put into possession of the property. A composition or scheme duly accepted and approved binds all the creditors, so far as any debt prov-



able in bankruptcy is concerned, but it does not release the bankrupt from liability in certain cases, *e.g.* under a judgment as co-respondent in a divorce, unless the court makes an order to that effect.

After a man is adjudicated bankrupt, the creditors may resolve to adopt a scheme of arrangement, and if such scheme of arrangement be approved by the court, the court may annul the bankruptcy.

**§ 280. Private Arrangements with Creditors.**—A debtor may arrange with his creditors privately that each shall accept part payment in satisfaction of the whole debt due. Such an arrangement only binds those creditors who are parties to it. It is not necessary that the agreement should be under seal, inasmuch as the forbearance of each to sue is a consideration sufficient to make the agreement a binding contract. Usually a deed is prepared by which, in consideration of the payment of a composition, the creditors release and discharge the debtor from the debts due. It is important that all the creditors should join. If one refuses, he may take bankruptcy proceedings, inasmuch as the making the composition is an act of bankruptcy (§ 260). If bankruptcy ensue, the deed takes no effect. It must be registered, otherwise it is void under the Deeds of Arrangement Act 1887.

**§ 281. Authorities.**—The law of bankruptcy is regulated by the Bankruptcy Act of 1883, with its amending Acts of 1884, 1887, 1888, and 1890. The student may refer with advantage to the treatises by Mr. Baldwin, Mr. Williams, and Mr. Robson.

## PART V

### THE APPLICATION OF LAW

§ 282. **Introductory.**—It has hitherto been assumed that all commercial disputes in England are governed by English law. As a general rule, the laws of a state apply to all persons and to all transactions within the state. But cases often occur where mercantile transactions are entered into in one country, but are to be performed in another country. For instance, A. and B. enter into a contract in England that is to be performed in France. Suppose a breach of this contract to take place, ought the action for damages to be brought in England or in France, and is the liability under the contract to be governed by English or by French law?

*Prima facie* the law of the place where the action is brought will be applied by the courts, but as a matter of commercial convenience every civilised country recognises and enforces to some extent the laws of other states.

§ 283. **What is Foreign Law?**—By foreign law is meant not merely the laws of foreign states, but the laws of different parts of the Empire. Ireland and Scotland have different laws from England. Each of the colonies has its own system of law. Irish, Scotch, and colonial law is, in England, regarded as foreign law.

§ 284. **Land.**—Land is always subject to the law of the place where it is situated. Such law governs—

1. The legal incidents that attach to its ownership ;
2. The capacity of the owner to transfer it, as well as the form of transfer ;
3. The capacity of the owner to leave it by will, the formalities of the will, as well as the effects of the will on the land ;
4. Who is to take the land in case the owner dies without making a will.

Hence if an Englishman buys land in France, such land will in all important respects be governed by the law of France.

As is well known, a man by English law cannot marry the sister of his deceased wife ; if he goes through the ceremony of marriage, any children resulting from the marriage are illegitimate. In some of the colonies such marriages are legal, and hence a child of the marriage is legitimate. But by English law such child cannot succeed to any land that his father may own in England, in case the father dies without making a will. To this extent colonial marriages with a deceased wife's sister are not recognised by the law of this country.

**§ 285. Moveable Property.**—The law of the “domicile” of a man at the time of his death determines—

1. His capacity to make a will, the formalities of the will, and the legal effects of the will ;
2. The person who is to take out letters of administration in case of intestacy, and how the property is to be divided ;
3. The duties to be paid by those who receive the property.

A distinction is drawn between (a) probate duty and (b) legacy and succession duty. The former is regarded as a part of the expense of getting in the assets, and is payable in respect of the authority given by the state to enable the assets to be collected. In the case of a will, the authority consists of the probate of the will ; in the case of intestacy, it consists of letters of administration, granted in England by the Court of Probate. The duty payable on the grant is payable in the country where the assets are collected.

Legacy duty is payable on all legacies, and succession duty on all successions to land. Such duties are regarded as a tax on the succession to property, and are payable according to the law of the domicile. For instance, if an Englishman domiciled in England dies, leaving personal property in France, probate duty will be payable in France, and legacy or succession duty in England.

**§ 286. Domicile.**—Reference has been made to the law of the domicile. Two elements are required in domicile: (1) actual residence in a country, and (2) an intention to remain in such country. If an Englishman goes to France, and hires a house for twelve months, intending to return to England, he does not acquire a French domicile; but if he takes the house intending to reside permanently in France, then he acquires for the time being a French domicile, even though he should subsequently change his mind and return to England.

Every man at his birth acquires the domicile of his father, and such domicile remains until he acquires a new one.

**§ 287. Contracts relating to Immoveables.**—All contracts relating to immoveable property, *e.g.* land, as we have seen (§ 284), is governed by the law of the state where the land is situated. The word land includes all interests in land, for example, leaseholds. The purchaser of land in a foreign country must therefore be careful to see that he observes the rules relating to the transfer of land in such country, otherwise he will not obtain a good title. He must also remember that he cannot dispose of such land except in accordance with the law of the foreign state. If, for example, the land be in France and the owner die intestate, the land will not descend to the eldest son, according to English law, but will be divided amongst all the children, according to French law.

**§ 288. Contracts relating to Moveables.**—As a general rule, a contract relating to moveable property is valid everywhere if valid by the law of the place where the contract is made. A contract is regarded as being made in the place where the offer is accepted. The validity of the contract may

be considered in detail with reference to (a) capacity to contract; (b) formalities; (c) rights and liabilities; and (d) performance.

(a) *Capacity to Contract*.—It is doubtful in the case of mercantile contracts whether the capacity of the parties is to be referred to the law of the place where the contract is made or to the law of the domicile. The older authorities adopt the former rule, whilst the modern English authorities tend to adopt the latter law, referring all questions of capacity to the law of the domicile of the party.

(b) *Formalities of the Contract*.—*Prima facie* the formalities required are those of the country in which the contract is made; but there is nothing to prevent Englishmen abroad from entering into contracts according to the formalities required by English law, provided it appears that the parties contracted with reference to such law. In other words, the formalities of a contract depend on the law contemplated by the parties; but in the absence of any evidence to the contrary, the parties are presumed to contract with reference to the law of the place where the contract is entered into.

If the law contemplated requires a stamp as a part of the formalities, the contract must bear such stamp.

The formalities of a contract must be distinguished from the evidence required to prove a contract in a court of justice. The rules that govern evidence are those embodied in the law of the country where legal proceedings are taken. Hence if an action be brought in England on a foreign contract that by English law must be evidenced in writing, such written evidence must be given, though it is not required by the law of the place where the contract is made.

(c) *Rights and Liabilities*.—The rights and liabilities of the parties depend on the law contemplated by the parties, but there is a *prima facie* presumption in favour of the law of the place where the contract is made. A., a merchant in London, sold to B., another merchant in London, 20,000 tons of Algerian esparto, to be shipped by a French company at an Algerian port. Default was made in

delivery, and B. brought an action for damages against A. It was urged that as the contract was to be performed at Algiers, the French law, which is the law of Algiers, applied, and under that law A. would not have been liable. The court held that as the contract was made in England, and as there was no evidence that the French law was contemplated by the parties, the liability of A. was to be governed by English law. "What is to be the law by which a contract, or any part of it, is to be governed or applied, must always be a matter of construction of the contract itself, as read by the light of the subject-matter and of the surrounding circumstances . . . the broad rule is that the law of the country where a contract is made presumably governs the nature, obligation, and the interpretation of it, unless the contrary appears to be the express intention of the parties."

Charter-parties and bottomry bonds are exceptions to the rule. The rights and liabilities of the parties are governed by the law of the flag, *i.e.* the law of the country to which the ship belongs.

**§ 289. Bills of Exchange.**—A bill of exchange may be drawn in one country and be accepted or made payable in another. The Bills of Exchange Act 1882 contains the following rules relating to such bills :—

- (a) As far as form is concerned, the bill will be valid in England if the English law or the law of the place of issue be followed (§ 242).
- (b) The absence of a stamp required by the foreign place of issue will not invalidate the bill.
- (c) The holder, in presenting for acceptance or for payment, or in protesting, or in giving notice of dishonour, should observe the law of the place where the act is done, or the bill is dishonoured.
- (d) An acceptance or endorsement should be according to the law of the place where the bill is accepted or endorsed.
- (e) The date depends on the law of the place where the bill is payable.

**§ 290. Jurisdiction in the Case of Contracts.**—The

question often arises whether or not an action for breach of a contract made abroad can be brought in this country. As a general rule, if the contract was to be performed in England and it is broken in England, the action can be brought. It is immaterial that the defendant resides in a foreign country, as the writ can, by leave of the court, be served on him in such foreign country. If the defendant is domiciled or ordinarily resident in Scotland or in Ireland, proceedings should be taken in the country in which he resides. Where the contract was to be performed abroad, but the defendant is resident in England, proceedings for breach can be taken against him in England.

**§ 290. Foreign Judgment.**—In some cases it may be necessary to bring an action in another country. Suppose judgment is obtained, but the defendant's property is in England, can the foreign judgment be enforced in England? If the defendant appeared, and the foreign judgment was a final one, and the foreign court had jurisdiction in the case, the party who obtained judgment in his favour may bring an action in England to enforce it. All that he requires to prove is that the foreign court had jurisdiction, and that the judgment was a final one. He will then obtain judgment in England that can be enforced.

Instead of adopting this mode of procedure, the plaintiff may, in case the English court has jurisdiction, bring an action on the original cause of action apart from the foreign judgment.

**§ 291. Authorities.**—*Private International Jurisprudence*, by J. A. Foote; *Private International Law*, by J. Westlake.

# APPENDIX

## GLOSSARY

**Alien.** He who is not a subject of the Crown is an alien. The status of aliens is regulated by the Naturalisation Act 1870.

**Annuity.** An annual payment granted to a person for life or other period. It is personal property. Frequently, however, its payment is secured by charging it on land, and then the land is a security for its payment.

**Artificial Person.** A number of individuals may be so united by law as to form an "artificial person," capable of acquiring legal rights and of being subject to legal duties, *e.g.* a corporation, a company, a college, a society. An artificial person is created by a charter granted by the Crown, or by Act of Parliament.

**Assets.** The property of a deceased person applicable to the payment of debts and legacies. The term is also used to denote the stock-in-trade and property of a trader.

**Bill of Sale.** A deed assigning chattels personal. The term is usually applied to mortgages of personal property. Such mortgages must be in a certain form, and be registered.

**Carrier.** A person who carries goods for hire. If the carrier undertakes to carry the goods of all comers, he is a "common carrier," and is answerable for the safety of the goods.

**Chancery Division.** The High Court of Justice is divided into two divisions; the one called the Queen's Bench Division, and the other the Chancery Division.

**Charge.** A charge is a burden placed on property. If A. charges his land with £100, the £100 can be raised out of the value of the land.

**Charter.** The Crown by a writing under seal, called a charter, can grant certain privileges to an individual, or incorporate a company.

**Chattel.** The term chattel covers all forms of property that do



not amount to an estate for life. Chattels are divided into two classes—chattels real and chattels personal. The former is restricted to chattel interests in land, *e.g.* leaseholds; the latter covers all other chattels.

**Chose in Action.** A right to bring an action.

**High Court of Justice.** The High Court of Justice and the Court of Appeal are the two branches of the Supreme Court of Judicature. The High Court is divided into three divisions—viz. the Chancery Division, the Queen's Bench Division, and the Probate, Admiralty, and Divorce Division.

**Imprisonment for Debt.** Direct imprisonment for debt has been abolished, but if a Court orders a person to pay a sum of money and he neglects to do so, he may be imprisoned for disobedience to the order of the Court.

**Incorporation.** The formation of an artificial person or corporation.

**Judicial Separation.** A husband and wife may be judicially separated without the marriage being dissolved. In this case neither party can remarry.

**Law.** "Every one is supposed to know the law," is a maxim acted on by the courts, on the ground that to permit a man to deny he did not know the law would encourage fraud.

**Letters Patent.** A writing sealed with the Great Seal. The Crown grants the monopoly of a new invention by letters patent.

**Lien.** The right of one person to retain property of another in his possession until a debt due is discharged.

**Mortgage.** The conveyance of an interest in land to secure the repayment of a sum of money.

**Ownership.** See *Property*.

**Property.** The word is often used to denote that which is the subject of ownership, but at times it means the right of ownership.

**Prerogative.** The Crown has certain privileges and a limited right of legislation that are referred to its prerogative, *e.g.* in virtue of its powers the Crown can incorporate a company.

**Personal Representatives.** The personal representatives of a deceased person are his executors where he has made a will and appointed executors, or the administrator appointed by the Court of Probate where he has made no will.

**Resolution.** Under the Companies Acts a special resolution is a resolution passed at one meeting and confirmed at another. The majority required at the first meeting is a three-fourths, and at the second meeting a simple majority of the members present in person or by proxy.

An extraordinary resolution is one passed by three-fourths of those present personally or by proxy.

**Security.** Anything that makes the payment of money due more assured is a security in the wide sense of the term, *e.g.* a bill of exchange. In a narrower sense of the term the word is used to denote that the payment of money is secured by being charged on property.

**Set of Bills.** Bills of lading as well as bills of exchange are usually issued in sets of three; that is to say, three copies are issued: one copy being used, the remaining copies are void.

**Title.** As applied to mercantile property, this term is used to denote the right to property as regards the method of transfer or the capacity of the grantor to transfer it.

**Trustee.** A person who holds property for the benefit of another is called a trustee.

**Ultra vires.** Where a company exceeds its powers it is said to act *ultra vires*.

**Underwriting.** Reference has been made in the text to the use of this term in insurance. It is also used to denote a guarantee that if the public do not take up all the shares in a company that is being brought out, the person giving the guarantee will take up a certain portion of the shares.

**Winding-up.** The process by which the existence of a company is terminated. It is initiated by a petition.

**Wrong.** The terms "wrong," "wrongful act," and "tort," are each used to denote the infringement of certain legal rights not arising out of contract. The injured party has an action for damages.

## PROPOSAL FOR LIFE INSURANCE

If any change has taken place in the Name it should be stated.	Name, Residence, Profession or Occupation of the Person whose Life is to be Assured ?	
Proof should be furnished in order that the Policy may be indisputable.	Place and Date of Birth ?	
	Has the Life been proposed to any other Office ? If so, name the Office and the result of the Proposal	
	Name and Residence of usual Medical Attendant ; how long has he known you ?	
	Name and Residence of any other Medical Gentleman consulted within the past seven years ?	
If no Medical Attendant, a second Private Reference should be named.	Name and Residence of an intimate Private Friend ; how long has he known you ?	
	Sum to be assured ? With or without Profits ? Term for which Assurance is required ?	
This question need only be answered when the Proposal is on the Life of another person.	Name, Residence, and Occupation of the Person in whose favour the Policy is to be granted ?	

I declare the above statements are true ; that the Private and Medical Referees named are competent to give information as to past and present state of health and habits of life ; and I agree that such Statements, together with those made *or to be made to the Medical Officers of the Society and signed by me*, shall be the basis of the proposed contract of Assurance.

*Signature of the Person whose }  
Life is to be Assured.*

Witness

Date

*The Policy, on the age being admitted, will be indisputable except on the ground of fraud.*

## FORM OF LIFE POLICY

	<i>No.</i>
<i>Sum Assured £</i>	<i>Premium £</i>

*WHEREAS*  
(hereinafter called The Life Assured), whose age is admitted not to exceed \_\_\_\_\_ years, has this day paid to the  
ASSURANCE SOCIETY the sum of \_\_\_\_\_  
as a first Premium on this Policy and  
the like Premium is to be paid on the same day in  
every future year during the whole survivorship of The Life Assured  
in order to keep this Policy on foot :

*Now these Presents witness*, That on the death of The Life Assured and on due proof given of the death and of title, the Society will pay to the executors, administrators, or assigns, of The Life Assured the sum of \_\_\_\_\_ pounds, together with any BONUS which according to the provisions of the Deed of Settlement of the Society may at the time of such death be attached to this Policy :

*Provided* That this Policy is granted upon the following conditions, that is to say :—

- (1) That payment of every Premium, which is to be paid as above mentioned, be made within Thirty Days from the day fixed for payment thereof ; and if so made, this Policy shall remain in force notwithstanding the death of The Life Assured during such thirty days.
- (2) That, if The Life Assured commit suicide within one year from the date of this Policy, all money which would otherwise have become payable for the benefit of his estate under this Policy shall be forfeited and belong to the Society ; but this condition shall not prejudice the interest in such money of any Assignee for value.

*Provided also* That the Society's Assurance Fund for the time being, and the Proprietors' Fund on the first day of \_\_\_\_\_ (which then amounted to the sum of £ \_\_\_\_\_), and so much of the Capital of the Society, held in Shares by the Proprietors and others, as on the said first day of \_\_\_\_\_ had not been paid up or according to the provisions of the Deed of Settlement been considered as paid up (such Proprietors' Fund and Capital amounting together to the sum of *One Million Pounds Sterling*), shall alone be liable to any claim or demand in respect of this Policy ; and no

Director signing this Policy, nor any other Proprietor, shall be liable to any claim or demand in respect thereof beyond the unpaid portion of the Capital held by him. And as to the Proprietors' Fund, nothing herein contained is to be construed to give to any person entitled to the benefit of this Policy any charge or claim on any accumulation thereof made, or to be made, after the thirty-first day of

*In witness whereof* We, Three of the Directors of the said Society, have hereunto set our hands this                      day of  
One thousand eight hundred and

*Examined*

*Entered*

#### NOTICE

*All Notices of Assignment of the Policy must be sent direct to Street, London, the principal place of business of the Society.*  
No Agent of the Society is authorised, under any circumstances whatever, to receive, acknowledge, or transmit such Notice.

#### GUARANTEE OF SURRENDER VALUE

The within written Policy will acquire a Surrender Value so soon as three full annual Premiums have been paid, and the Society then guarantees the following sums as the Surrender Value, namely :—

- (1) One-third of so much of the Premiums received as would represent ordinary Premiums on the same Policy according to the true age at the date of issue thereof.
- (2) The full Cash Value calculated according to the published Bonus Table of the Profits (if any) attached to the Policy at the time of surrender.

#### PROTECTION AGAINST FORFEITURE FOR NON-PAYMENT OF PREMIUMS IN CERTAIN CASES AND FOR A LIMITED TIME

When a Policy has a Surrender Value, then, notwithstanding an omission to pay any subsequent Premium or Premiums, the Policy will remain in force unless and until the Surrender Value of the Policy, as at the date when the first unpaid Premium is payable, becomes exceeded by the total of the amount due in respect of Premiums, and in respect of any loan made on the Policy by the Society and of the accumulated compound interest with half-yearly rests on the amount of Premiums

and loan (if any) at the rate for the time being charged on loans made by the Society on the security of their Policies.

The Premium or Premiums due, if paid with accumulated compound interest at the before-mentioned rate while the Policy remains in force under this Provision, will be accepted by the Society.

*Own Life.*

*Age Proved.*

## FORM OF MARINE POLICY

£

**BE IT KNOWN THAT**

as well in \_\_\_\_\_ own Name, as for and in the Name and Names of all and every other Person or Persons to whom the same doth, may, or shall appertain in part or in all, doth make assurance, and cause \_\_\_\_\_ and them and every of them, to be insured, lost or not lost, at and from \_\_\_\_\_

upon any kind of Goods and Merchandises, and also upon the Body, Tackle, Apparel, Ordnance, Munition, Artillery, Boat and other Furniture, of and in the good Ship or Vessel called the

whereof is Master, under God, for this present voyage,

Master in the said Ship, or by whatsoever other Name or Names the said Ship or the Master thereof is or shall be named or called, beginning the Adventure upon the said Goods and Merchandises from the loading thereof aboard the said Ship

upon the said Ship, &c.

and shall so continue and endure, during her Abode there, upon the said Ship, &c., and further, until the said Ship, with all her Ordnance, Tackle, Apparel, &c., and Goods and Merchandises whatsoever, shall be arrived at

upon the said Ship, &c., until she hath moored at Anchor Twenty-four Hours in good Safety, and upon the Goods and Merchandises, until the same be there discharged and safely landed; and it shall be lawful for the said Ship, &c., in this Voyage to proceed and sail to and touch and stay at any Ports or Places whatsoever

without Prejudice to this Insurance. The said Ship, &c., Goods and Merchandises, &c., for so much as concerns the Assured, by Agreement between the Assured and Assurers in this Policy, are and shall be valued at

*Touching* the Adventures and Perils which we the Assurers are contented to bear and do take upon us in this Voyage, they are, of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests.

Restraints and Detainments of all Kings, Princes, and People, of what Nation, Condition, or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses, and Misfortunes that have or shall come to the Hurt, Detriment, or Damage of the said Goods and Merchandises and Ship, &c., or any Part thereof; and in case of any Loss or Misfortune, it shall be lawful to the Assured, their Factors, Servants, and Assigns, to sue, labour, and travel for, in, and about the Defence, Safeguard and Recovery of the said Goods and Merchandises, and Ship, &c., or any Part thereof, without Prejudice to this Insurance; to the Charges whereof we, the Assurers, will contribute, each one according to the Rate and Quantity of his Sum herein assured. And it is agreed by us the Insurers, that this Writing or Policy of Assurance shall be of as much Force and Effect as the surest Writing or Policy of Assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we the Assurers are contented, and do hereby promise and bind ourselves, each one for his own Part, our Heirs, Executors, and Goods, to the Assured, their Executors, Administrators, and Assigns, for the true Performance of the Premises, confessing ourselves paid the Consideration due unto us for this Assurance by the Assured

at and after the Rate of

*In witness* whereof, we the Assurers have subscribed our Names and Sums assured in

*N.B.*—Corn, Fish, Salt, Fruit, Flour, and Seed are warranted free from Average, unless general, or the Ship be stranded; Sugar, Tobacco, Hemp, Flax, Hides, and Skins are warranted free from Average under Five Pounds per Cent; and all other Goods, also the Ship and Freight, are warranted free from Average under Three Pounds per Cent, unless general, or the Ship be stranded.



## QUESTIONS

### MERCANTILE PERSONS AND MERCANTILE PROPERTY

#### §§ 1 to 24

1. Can a married woman carry on a trade?
2. Define a partnership.
3. What is meant by a limited liability company; how is it formed?
4. Describe a "memorandum of association," stating what it contains.
5. What are "articles of association"?
6. What is meant by a "share"? A. applies for shares in a company, when will he be bound to take them; up to what time can he withdraw his application?
7. When will the court order a company to be wound up?
8. What is meant by saying that moveable property is the subject of absolute ownership?
9. What special characteristics attach to the ownership of British ships?
10. Distinguish stock from shares. What is meant by "2½ per cent consols"?
11. What is a debenture; how does it differ from debenture stock?
12. What is copyright; how long does copyright in a book last?
13. What is a design; how can the right to the exclusive use of a design be obtained?
14. What is a patent; how is it obtained, and for how long does it last?
15. How is the exclusive user of a trademark obtained? how is a trademark assigned?

## THE FORMATION OF CONTRACTS

## §§ 26 to 37

1. What is a contract ; how does it differ from an agreement ?
2. "Every agreement can be analysed into an offer and an acceptance." Explain this statement.  
A firm of auctioneers advertise that they will sell furniture by auction on a certain day : B. goes to the auction-rooms at the time advertised, and is informed that the auction will not take place, has he any claim for his expenses against the auctioneer ?
3. A. makes an offer by post, and B. accepts by telegram, when is the acceptance complete ?
4. A. gets into a tramcar, travels a certain distance, pays his fare, and then gets out. Show that there was a contract between the tramcar company and A., pointing out the offer and the acceptance.
5. State the chief rules relating to the revocation of offers.
6. A. advertises that he will give £100 to any person who, suffering from a cold, uses an article sold by A. and is not cured. B., who is suffering from cold, buys the article and is not cured, can he recover the £100 ?
7. At what moment of time is the revocation of an offer complete ?
8. When does an agreement amount to a contract ?

## THE CAPACITY OF PARTIES TO CONTRACT

## §§ 38 to 57

1. To what extent can an infant enter into contracts binding on him ?
2. A., being under 21 years of age, purchases a horse for £150, on credit ; when he comes of age he writes a letter to the vendor admitting that the £150 is due for the horse ; can the vendor sue him and recover the £150 ?
3. Can a money-lender recover money lent to a person under 21 years of age ?
4. What is meant by "necessaries" ? Are books necessities ? How is the question as to what are necessities determined ?
5. Distinguish "void" from "voidable" contracts : what contract of an infant falls under each class ?

6. When can a married woman enter into a contract binding on her?

7. What is separate estate? A married woman owning separate estate incurs a large debt at her dressmaker's, can she be sued for the debt?

8. A married woman is sued for a debt; it turns out she had no separate estate at the time she contracted the debt, but acquired separate estate afterwards; is such estate liable to pay the debt?

9. What power has a married woman to contract as agent of her husband?

10. How does a corporation enter into a contract?

11. When may a corporation contract without using its seal?

12. Is a contract entered into by a lunatic binding on him?

13. A. contracts with B., a lunatic, not knowing that he is insane, what is the position of the parties?

14. A., whilst drunk, enters into a contract with B., is such contract binding?

#### THE FORM OF AND CONSIDERATION FOR CONTRACTS

##### §§ 58 to 73

1. How many classes of contracts are recognised by English law?

2. What is a record; what are contracts by record?

3. What are the requisites of a contract under seal?

4. What is a deed; from what time does it date? Distinguish a deed from an escrow.

5. What contracts usually require a deed?

6. When ought a trading corporation to contract under seal?

7. Define a simple contract?

8. What simple contracts are required to be in writing?

9. A. engages a servant at the rate of £20 a year, wages to be paid monthly, ought the contract to be in writing?

10. When ought contracts for the sale of goods to be in writing?

11. What is a consideration?

12. Distinguish an executed from an executory consideration.

13. A., being in want of money, sells B. a picture that is worth £500 for £100; can A. afterwards set aside the sale on the ground that B. did not give him the full value of the picture?

14. A. owes B. £100, and B. threatens legal proceedings; A.

writes B. asking for a month's time to pay ; B. replies saying he will wait for a month. Is B. legally bound to wait the month?

15. What is a past consideration ; will it support a simple contract?

### LEGALITY AND POSSIBILITY OF PERFORMANCE

#### §§ 74 to 87

1. A. lends B. money for an illegal purpose ; can he recover it?
2. Can A. insure B.'s life?
3. Can a father insure his son's life?
4. What restrictions exist as to trading on Sunday? Is a contract made on a Sunday binding?
5. What special rules exist regarding the sale of game, coal, and bread?
6. What is meant by an agreement in restraint of trade? To what extent is such an agreement lawful?
7. A. sells his business and the goodwill thereof to B., can A. set up a similar business in the same street?
8. What conditions must be fulfilled in order that the court may uphold an agreement in restraint of trade?
9. A. threatens to make B. a bankrupt, B. offers A. £10 not to do so, and A. accepts the offer, is the agreement binding?
10. Enumerate and describe the different kinds of "impossibility of performance."
11. When will impossibility of performance avoid a contract?
12. A., a married man, proposes marriage to B., who knows he is married ; B. afterwards brings a breach of promise against A.; is A. liable for damages?
13. A. sells B. shares that he (A.) does not possess, and fails to deliver them to B., has B. any remedy?

### MISTAKE, MISREPRESENTATION, AND FRAUD

#### §§ 88 to 97

1. What is meant by unreality of consent?
2. When will mistake avoid a contract?
3. A. buys from B. a piece of old china which he (A.) believes to be Dresden, but which B. knows is not Dresden, is the sale binding?

4. A. sells B. a piece of china, both believe it to be Dresden, but it is not, is the sale binding?

5. What amounts to a misrepresentation? Distinguish misrepresentation from fraud.

6. When will misrepresentation be a ground for avoiding a contract?

7. A. reads the prospectus of a company and applies for shares, which are allotted to him. Afterwards, he finds that some of the statements in the prospectus are untrue: can he rescind the contract to take shares?

8. What remedies are open to a person who has been induced to enter into a contract by misrepresentation or by fraud?

### ASSIGNMENT OF CONTRACTS

#### §§ 98 to 101

1. Can the liability under a contract be assigned?

2. A. owes B. £10, can B. assign the right to receive the money to C.? If so, how must the assignment be made?

3. A. has bought 1000 pieces of cloth, can he assign to C. the right to receive the cloth?

4. How is a bill of exchange assigned?

5. Illustrate the assignment of rights and liabilities by operation of law.

### PERFORMANCE, BREACH, AND DISCHARGE

#### §§ 102 to 110

1. In what form must tender of money be made in order to amount to "legal tender"?

2. A. owes B. £20, and B. gives him a bill of exchange for £20, is the debt discharged?

3. When can a party to a contract refuse performance where there has been a breach on the other side?

4. A. commits a breach of a contract made with B., what are B.'s remedies?

5. How can a contract be discharged?

6. A. enters into a written contract with B.; they desire to rescind it. How can this be effected?

## PARTNERSHIP

## §§ 112 to 119

1. Define a partnership. A. becomes a partner on condition that he is to have no share in the profits, is such an arrangement binding?
2. Is sharing profits conclusive evidence of partnership?
3. What power has a partner to bind the firm?
4. To what extent is a partner liable for the debts of the firm?
5. How does the law of Scotland differ from that of England as to liability?
6. What is the position of a person who holds himself out to be a partner?
7. What effect has the purchase of land for partnership purposes upon the legal characteristics of such land?
8. State the chief duties of partners as between themselves.
9. Suppose the partners differ as to the management of the business, how is the matter decided?
10. What effect has the death of a partner on the partnership?
11. How is a partnership dissolved?
12. What are the effects of a dissolution?
13. Is the private property of a partner liable for the debts of a firm?

## PRINCIPAL AND AGENT

## §§ 121 to 132

1. Distinguish a factor from a broker.
2. What is a *del credere* agent?
3. Distinguish a "general" from a "special" agent.
4. How may an agent be appointed?
5. What is meant by ratification? What conditions are required for a valid ratification?
6. What power has an agent to bind his principal?
7. When can an agent appoint a sub-agent? What relation exists between the sub-agent and the principal?
8. Describe the chief duties of an agent.
9. What degree of diligence must an agent show in discharge of his duties?
10. What remedies has an agent for his commission?

11. What are the chief duties of the principal as regards the agent?
12. The principal directs his agent to do a wrongful act, is the agent bound to do it? Is the principal or the agent liable for the wrong done?
13. An agent contracts with a third party without disclosing the name of his principal, what is the legal position of the parties?
14. When is an agent personally liable on a contract?
15. What is the result where an agent falsely pretends to be an agent and enters into a contract?
16. What special powers are possessed by (a) factors, (b) brokers?
17. What are the powers of an auctioneer?
18. The principal revokes the authority of an agent, who after such revocation enters into a contract on behalf of the principal, is the contract binding on the principal?
19. In what way is the relation of principal and agent terminated?

### THE SALE OF GOODS

#### §§ 134 to 159

1. Distinguish a sale from an agreement to sell.
2. Distinguish sale from "gift" and from "barter."
3. What is meant by price? Suppose the parties do not agree on the price, is there a valid sale?
4. What form is required for a contract for the sale of goods under £10?
5. State the form requisite for a sale of goods over £10 in value.
6. What is meant by "acceptance and receipt"? A. orders a package of sponges from B. at 11s. per lb. On the arrival of the package A. examines the sponges, and finding them worth only 6s. a lb. returns them to B. Was there an acceptance and receipt of the goods sufficient to satisfy the Statute of Frauds?
7. Distinguish "earnest" from "part payment."
8. Under what circumstances can a contract in writing be gathered from a series of letters?
9. Where a contract of sale of goods over £10 in value is reduced to writing, what ought the memorandum to contain?
10. Can a written offer be accepted orally; will such acceptance satisfy the Statute of Frauds where the goods sold are over £10 in value?

11. State the chief rules relating to the signature of contracts so as to satisfy the Statute of Frauds.
12. How are the provisions of the Statute of Frauds fulfilled in the case of a public auction?
13. Explain the nature of a "bought" and a "sold" note.
14. What are the powers and functions of a "broker"?
15. Explain the rule *caveat emptor*.
16. What is a warranty?
17. When does the law imply a warranty?
18. What warranties are implied in a sale by sample?
19. A. orders goods from B. of his own manufacture; B. supplies similar goods made by C.; is A. bound to accept them?
20. What are the chief duties of a seller of goods?
21. Is a seller of goods bound to send them to the purchaser?
22. What is meant by lien? What lien has a seller over the goods sold?
23. What is stoppage *in transitu*? When and how is it exercised?
24. When can a seller resell goods not paid for by the buyer?
25. Mention some acts that amount to acceptance of goods by the buyer.
26. How should the price be tendered so as to be a "legal tender"?
27. A. owes B. £5 : 6 : 8 for goods bought; he tenders a £10 note, which B. refuses; is the tender good?
28. A. buys £100 worth of goods from B., and gives B. a bill of exchange. The bill is not paid when due. Can B. sue A. on the original contract, apart from the bill?
29. Can an agent of the seller receive payment? A. owes B. £10 for goods bought. He meets a clerk from A.'s shop in the street, and pays him the £10. The clerk runs away and B. demands payment. Can A. successfully resist the demand?
30. A. writes B. to ask him to remit the amount of a debt by cheque by post. B. posts a cheque for the amount, but the letter never reaches A. The bank on which the cheque was drawn suspends payment. A. writes B. saying he has not received the cheque. B. replies he sent it as requested. Can B. be compelled to pay A.?
31. A. enters B.'s shop and selects a box of cigars. C. seizes the cigars and runs away with them. Who has to bear the loss, A. or B.?
32. A. orders 20 lbs. of sugar from B. at 2d. a lb. of a certain quality, when will the ownership of the 20 lbs. pass to A.?
33. When does the ownership pass to the buyer when goods are sent on approval?



34. When will the ownership of unascertained goods pass to the buyer? What is meant by unascertained goods?
35. Can a seller reserve the right to dispose of goods after he has made delivery?
36. A thief sells B. goods stolen from A., can A. claim the goods from B.?
37. What is the effect of a sale in market overt? What is market overt?
38. Can an unpaid seller claim interest on the price from the buyer?
39. What is the remedy of a buyer where the seller refuses to deliver goods bought from him?
40. When can a buyer refuse to take delivery of goods?

## INSURANCE

## §§ 161 to 186

1. What is insurance?
2. What is meant by saying that fire and marine insurance are based on the principle of indemnity?
3. What conditions must be observed by any one who is making a proposal for insurance?
4. What is an insurable interest?
5. A person insured omits to pay the premium when it is due, but pays it during the days of grace, what is the effect on the policy?
6. What is meant by underwriting?
7. Distinguish a valued from an open policy.
8. Distinguish a voyage from a time policy.
9. What is the slip; has it any legal effect?
10. What is a warranty? What warranties are implied in a marine policy?
11. What amounts to seaworthiness?
12. Explain the terms "average," "free from average," and "general average."
13. What amounts to a total loss? A vessel is wrecked, what steps should the owner take so as to be able to claim for a total loss?
14. How is a partial loss calculated?
15. When can A. insure B.'s life?
16. The proposer for a life insurance makes an untrue statement in the proposal, what effect has this on the policy?
17. Can a policy of life insurance be assigned?

18. What is meant by fire in a fire policy?
19. What losses are usually excepted in a fire policy?
20. What conditions, if they occur, will usually avoid a fire policy?
21. What steps ought to be taken when a loss occurs by fire?
22. Suppose the articles are insured in different offices, can the insured recover from each?

### GUARANTEES

#### §§ 188 to 194

1. Describe the nature and objects of a guarantee.
2. In what form must a guarantee be made?
3. State the position of the party guaranteeing; can he be sued before the principal?
4. What is a continuing guarantee?
5. What is the position of a surety who pays the whole debt as regards the principal debtor?
6. A. B. and C. are sureties for D.; D. fails to pay, and A. is sued. Is A. liable for the whole debt? Suppose he pays the whole, what right has he against B. and C.?
7. A. B. and C. are sureties; A. is sued for the whole debt; can he, before paying anything, call on B. and C. to contribute their shares?
8. Distinguish joint from several liability.
9. When can a surety withdraw from a guarantee?
10. What conduct on the part of the creditor will discharge the surety?
11. A. is surety for B. paying a debt to C. on the 1st January. C. extends the time to the 1st February, but before the 1st February B. becomes bankrupt; is A. liable to C.?

### CHARTER-PARTIES AND BILLS OF LADING

#### §§ 196 to 235

1. What is a charter-party?
2. What warranties are implied in a charter-party?
3. What is freight; when is it earned?
4. Mention some of the chief provisions found in charter-parties.
5. What is tonnage?
6. On sailing, a captain is paid a portion of the freight, when

will such payment be an advance, and when a loan? What is the importance of the distinction?

7. What are lay-days?
8. What is the mate's receipt?
9. What perils are usually excepted in a charter-party?
10. What is a bill of lading? how is it transferred?
11. What is the duty of the captain as regards deviation?
12. To whom are goods comprised in a bill of lading to be delivered?
13. What perils are usually excepted in a bill of lading?
14. What is meant by "act of God"?
15. What perils are covered by the phrase "perils of the sea"?
16. What is barratry?
17. How far is the shipowner liable for bad stowage?
18. How does a shipowner protect himself from liability for deterioration to the cargo due to the nature of the goods?
19. What is demurrage?
20. What is general average? who must contribute to it?
21. What is salvage?
22. What is the nature and object of a bottomry bond?
23. What powers has the master as regards the shipowner?
24. To what extent is the master the agent of the cargo-owner?

#### BILLS OF EXCHANGE

##### §§ 237 to 256

1. What is a bill of exchange? Write out an example.
2. Distinguish an inland from a foreign bill.
3. What are the requisites of a bill of exchange?
4. What is presentation for payment? When is it necessary?
5. What are days of grace?
6. Where is a bill payable? If an acceptor desires to pay at a given place, how should he accept?
7. Who is the acceptor? What is his legal position?
8. How can a bill be transferred?
9. Who is the drawer? What is his legal position?
10. Who is an endorser? When is he liable to a subsequent holder?
11. What course ought the holder of a bill to take if the bill be dishonoured?
12. Distinguish a cheque from a bill of exchange.
13. What is the effect of crossing a cheque?
14. What is the effect of writing "not negotiable" across a crossed cheque?

15. Has the holder of a dishonoured cheque any remedy against the bank?
16. What advantage does the holder of a cheque derive by presenting the cheque within a reasonable time after he receives it? What is a reasonable time?
17. What is a promissory note? Is presentation necessary?
18. What is an I.O.U.? Can it be transferred?

### BANKRUPTCY

#### §§ 258 to 280

1. What is meant by an act of bankruptcy?
2. Enumerate the chief kinds of acts of bankruptcy.
3. When can a creditor present a petition in bankruptcy?
4. What is an order of adjudication? What is its effect?
5. Can a married woman be made bankrupt?
6. What are the chief duties of the official receiver?
7. What is the object of the first general meeting?
8. What is a scheme of arrangement? How must it be passed to be binding?
9. How is the trustee appointed? What are his chief duties and powers?
10. What is the committee of inspection? How is it appointed?
11. How are debts proved in bankruptcy?
12. What is a secured debt? What is the position of a creditor whose debt is secured?
13. What property belonging to the bankrupt is not available for paying his debts?
14. What property belonging to others is liable for a bankrupt's debts?
15. When are goods said to be in the order or disposition of a bankrupt?
16. A bankrupt made a settlement of part of his property before his bankruptcy, is such settlement perfectly valid?
17. What is onerous property? What powers has the trustee over such property?
18. How does a bankrupt get his discharge?
19. What are the effects of a discharge?
20. When will a discharge be withheld or suspended?
21. What disabilities is a bankrupt under?
22. When will an adjudication be annulled?
23. What conditions must be fulfilled before a scheme of arrangement is binding?
24. What is the effect of a private arrangement with creditors?

## THE APPLICATION OF LAW

## §§ 282 to 290

1. By what law is the ownership of land governed? A. is a Scotchman residing in England, and owning land in Scotland. He dies without a will. What law will govern the descent of the land?
2. What is domicile?
3. An Englishman, domiciled in England, owns shares in an Australian bank; he wishes to leave them by will: ought the will to be in accordance with English or Australian law?
4. By what law is the validity of a contract governed?
5. A bill of exchange is drawn in France according to French law, and is payable in England, is the bill valid according to English law?
6. How can a foreign judgment be enforced in England?



# INDEX

*The figures refer to the pages*

ACCEPTANCE of bill, 135, 137  
 of bid at auction, 12  
 of goods, 72, 87  
     distinguished from receipt,  
     72  
 of offer, 12, 14  
     implied, 14  
     must be complete, 14  
 Acknowledgment of a debt, 29  
 Act of God, 128  
 Adjudication in bankruptcy, 145  
 Administrator, his duties, 2  
 Advertisement, offer by, 12  
     of sale by auction, 12  
     sale by tender, 13  
 Agent—  
     accounts, 63  
     appointment of, 61  
         expressly, 61  
         impliedly, 61  
     auctioneer, 66  
     authority, 61  
         express, 62  
         implied, 62  
     brokers, 66  
     commission agent, 60  
     commission payable, 63  
     contracts with third parties,  
     64  
     *del credere*, 61  
     diligence required, 62  
     discharge of, 68

Agent—  
     duties, 62  
         accounts, 63  
         commission, 62  
         diligence, 62  
         emergencies, 62  
         fidelity, 63  
         moneys, 62  
     duties of principal, 63  
         payment of remuneration, 63  
             ,, of expenses, 63  
             ,, of losses, 64  
     effect of death, 68  
     factors, 60, 65  
     false representation as to, 65  
     fidelity required, 63  
     general, 61  
     kinds of agents, 60  
     liability for wrongful acts, 64  
         to third parties, 64  
         where not an agent, 65  
         where principal undisclosed,  
         64  
     obedience required, 62  
     partner an agent of firm, 55  
     revocation of authority, 59  
     ratification of acts, 16  
     signature by, 76  
     skill required, 62  
     special, 61  
     sub-agent, 66  
     wife, agent for husband, 22

- Agreement, 11  
   acceptance of offer, 12  
   offer, 11, 12, 13, 14  
   parties, 11  
   requisites of, 11  
   when a contract, 17  
 Agreements not to be performed  
   within one year, 30  
 Aliens, 160  
   capacity to trade, 1  
 Annuity, 160  
 Annulment of bankruptcy, 152  
 Application of foreign law, 154  
   to bills of exchange, 158  
     contracts, 156  
     judgments, 159  
     land, 154  
     moveables, 155, 156  
 Arbitration, powers of partners  
   as to, 55  
 Arrangement with creditors, 152  
   private, 153  
   under scheme, 152  
 Artificial person, 2, 160  
 Assets, 160  
 Assignment—  
   of bills of exchange, 48, 137  
   of debts, 48  
   of liabilities, 47  
     by operation of law, 48  
   of life insurance policy, 102  
   of rights, 47  
     by operation of law, 48  
 Auction, effect of bid, 12  
 Auctioneer, 66  
   payment to, 88  
   signature on sale of goods, 76  
 Average, 100  
   free from, 100  
   general, 131  
  
**BANKRUPTCY, 143**  
   acts of, 144  
   adjudication, 146  
   annulment of, 152  
   arrangements with creditors,  
     152, 153  
   Board of Trade, duties of, 143  
  
**Bankruptcy—**  
   committee of inspection, 147  
     powers of, 147  
   disabilities of a bankrupt, 152  
   discharge of bankrupt, 150  
     when refused, 151  
     when suspended, 150  
   disclaimer, 149  
   dividends, 150  
   debts provable, 148  
     where secured, 148  
   first general meeting, 146  
   official receiver, 145  
   order of adjudication, 145  
   order of discharge, 151  
     effect, 151  
   petition, presentation of, 145  
   private arrangements, 153  
   proof of debts, 148  
   property available for payment  
     of debts, 148  
   public examination, 146  
   report on conduct, 150  
   scheme of arrangement, 153  
   statement of affairs, 146  
   special manager, 146  
   trustees in, 147  
     how appointed, 147  
     powers of trustee, 147  
     relation to committee of in-  
       spection, 147  
   who can be made bankrupt, 144  
     infants, 144  
     married woman, 145  
   who can petition, 145  
     a creditor, 145  
     the bankrupt, 145  
 Bankruptcy laws, fraud on, 37  
 Bill of exchange, acceptance by  
   partner, 55  
   acceptor, position of, 137  
   amount, 135  
   assignment of, 48  
   date, 136  
   drawer, position of, 137  
   endorser, position of, 138  
   foreign bill, 135  
   by what law governed, 158



- Bill of exchange—  
   form of, 135  
   holder, position of, 138  
   inland bill, 135  
   issue of, 136  
   place of payment, 137  
   presentation for payment, 136  
   stamp required, 136  
   time for payment, 136  
   transfer of, 137  
 Bill of lading, 112  
   damage excepted, 129, 130  
   delivery in good order and condition, 126  
   demurrage, 130  
   description of goods, 125  
   destination, 126  
   deviation, 126  
   deviation to tow vessels, 127  
   form of, 123  
   freight, 127  
   nature of, 122  
   obliteration of marks, 136  
   perils excepted—  
     accidents of navigation, 128  
     act of God, 128  
     barratry, 129  
     collisions, 130  
     enemies, 129  
     fire, 129  
     strandings, 129  
   pilotage, 127  
   quarantine, 130  
 Bill of sale, 160  
 Blank form of transfer, 26  
 Board of Trade, powers of, in bankruptcy, 143  
 Bottomry bond, 132  
 Breach of contract, 51  
   by failure of performance, 51  
   by impossibility of performance, 51  
   by renouncing, 51  
   remedies for, 52  
 Bread to be sold by weight, except fancy bread, 35  
 British ship, effect of alien purchasing, 1  
 British ship, number of shares in, 7  
 Broker, 14, 66  
 CALLS on shares, 5  
 Capacity—  
   to contract, 18, 157  
   corporations, 22  
   infants, 18  
   lunatics, 23  
   married women, 20  
   to make a will, of land, 155  
   of moveables, 155  
   to bequeath land, 155  
   to transfer land, 155  
 Carrier, 160  
 Chancery Division, 160  
 Charge, 160  
 Charter, 160  
 Charter-party, 112  
   brokerage, 122  
   capacity of vessel, 129  
   consignment of vessel, 122  
   description of ship, 118  
   despatch, 113  
   deviation, 113  
   expense of loading, 121  
   form of, 114  
   freight, 113  
     express lien, 121  
     stipulations as to, 120  
   mate's receipt, 121  
   name of ship, 118  
   nature of cargo, 120  
   nature of contract, 112  
   perils excepted, 122  
   place of loading, 121  
   provision in case of war, 122  
   seaworthiness, 113  
   voyage, 118  
 Chattel, 7, 160  
 Cheque, 140  
   "and Co." 140  
   compared with bill, 140  
   duty of bank, 140  
   "not negotiable," 140  
   presentation of, 141  
 Chose in action, 7, 161  
 Classes of contracts, 24

- Coal to be sold by weight, 35
- Committee of inspection, 147
- Communication—
  - of acceptance, 13
  - by letter, 13
  - by telegram, 13
  - when complete, 13
  - of offer, 13
- Company—
  - articles of association, 3, 4
  - definition of, 2
  - directors, 5
    - powers of, 5
  - how incorporated, 2
  - limited and unlimited liability, 3
  - memorandum of association, 3, 4
  - resolution to wind up, 162
  - seven persons necessary, 4
  - shares, 5
  - unincorporated, 2
  - winding up, 5
- Consent, reality of, 40
- Consideration, 25
  - amount of, immaterial, 32
  - executed, 32
  - executory, 32
  - must be lawful, 33
  - past, 32
  - rules as to, 32
  - what is a, 31
- Consols, 8
- Contract—
  - agreement, relative to, 11
  - assignment of, 47
  - breach of, 51
  - capacity to, 18, 22, 157
    - corporations, 22
    - infants, 18
    - lunatics, 22, 23
    - married women, 20
  - definition of, 11
  - formation of, 11
  - foreign, 156
  - foreign law, when applicable, 156, 157
  - offer and acceptance, 11
  - performance of, 50
  - with corporations, 27
- Contracts—
  - by deed, 25, 26
  - of record, 25
  - for sale of goods, 30
  - under seal, 26
    - omission of a material part, 27
    - requiring a seal, 27
    - requisites, 26
      - delivery, 26, 27
      - sealing, 26
      - writing or printing, 26
- Copyright, 9
- Corporations—
  - contracts with, 27
    - by agents, 22
    - under seal, 28
  - definition of, 22
  - municipal, 28
  - non-trading, 28
  - powers of contracting, 22
  - trading, 28
- DEBENTURE, 9
  - stock, 9
- Debts—
  - assignment of, 48
  - barred by lapse of time, 29
    - unless acknowledged, 29
  - imprisonment for, 161
- Deceit, action for, 46
- Deed, requisites of, 26
  - delivery, 27
  - writing, 26
  - sealing, 26
  - partner cannot bind firm by, 55
- Delivery, meaning of, 84
- Demurrage, 130
- Despatch, 113
- Deviation, 113
- Directors, powers of, 5
- Disabilities of a bankrupt, 152
- Discharge of contract, 51
  - by breach, 51
  - „ consent, 51
  - „ fulfilment, 51
  - „ operation of law, 51

- Discharge of contract by performance, 51
- Disclaimer of onerous property, 149
- Domicile, nature of, 156  
governs moveable property, 155
- Drawer of bill, 137
- Drunkness, effect on contracts, 23
- EARNEST, 73
- Equities, 48
- Executed consideration, 32
- Executor, definition of, 1
- FACTOR, 60, 65
- Fire insurance—  
a contract of indemnity, 102  
concurrent policies, 105  
conditions avoiding policy, 105  
explosion, 104  
"fire," meaning of, 103  
insurable interests, 103  
notice of loss, 105  
premium, the, 105  
property insured, 104  
of married women, 104  
of trustee, 104  
usual exceptions, 104  
proposal, the, 104  
risk undertaken, 103  
spontaneous heating, 104
- Firm, relation of, to members, 2
- Foreign bills, 135
- Foreign law, what is, 154  
how enforced, 159  
judgments, 159  
when applied, 154
- Form of contract, 25  
by what law governed, 157
- Fraud, 45  
distinguished from misrepresentation, 46  
on creditors, 37  
reckless statements, 45  
remedies for, 46  
untrue statements, 45  
knowledge of untruth, 45
- Freight, 113  
express lien, 121  
in bill of lading, 127
- Funded debt, 8
- GAME, sale of, 35
- General average, 100, 131
- Goodwill, 10
- Guarantee, 107  
continuing, 108  
death of surety, 110  
discharge of surety, 110  
by conduct of creditor, 110  
,, notice, 110  
,, payment, 111  
extending time for payment, 110  
fidelity, 108  
form of, 107  
liability of surety, 108  
nature of contract, 107  
rights of surety, 109  
Statute of Limitations, 111  
surety entitled to securities, 111  
writing required, 29, 107
- HIGH Court of Justice, 161
- Holder of bill, 138
- Husband and wife, contracts between, 22
- ILLEGAL contracts, 34  
agreements, in fraud of creditors, 37  
in fraud of bankruptcy laws, 37  
in restraint of trade, 35  
object unlawful, 34  
selling game out of season, 35  
selling goods, by improper weights, 35  
on Sunday, 34  
where insurer has no interest in policy, 34
- Implied contracts, 15  
revocation of offer, 15

- Impossibility of performance, 38  
     remedy, 51  
 Incorporation, 161  
 Indemnity, none in life insurance, 101  
 Infants, capacity to contract, 19  
     ratification of contracts, 20  
     Relief Act, 18, 20  
     trading in city of London, 20  
 Inland bills, 135  
 Insurance—  
     fire, 102  
     life, 94  
     marine, 96  
 Intoxicants, sale of, 35  
 I.O.U. 141  
  
 JOINT Stock Companies. See Company  
 Judgment, foreign, how enforced, 159  
     debt, 25  
 Judicial separation, 161  
 Jurisdiction in contracts, 158  
  
 LAND, governed by law of place  
     where situate, 154  
     used for trading, 6  
 Leaseholds, 7  
 Legacy duty, by what law governed, 156  
 Legal tender, 50, 89  
 Legality of contracts, 34  
 Letters of administration, by what law governed, 155  
 Letters-patent, 9, 161  
 Liability of shareholders, 3  
 Lien, 85  
     of seller of goods, 161  
 Life insurance, 101  
     assignment of policy, 102  
     form of life policy, 164  
     form of proposal for, 163  
     insurable interest, 101  
     policy, the, 101  
     premium, the, 102  
     proposal, the, 101  
     not an indemnity, 101  
  
 Lunatic, contracts during lucid intervals, 23  
     contracts with notice of lunacy, 24  
     contracts without notice of lunacy, 24  
     contracts for necessities, 23  
  
 MARINE insurance, 166  
     of cargo, 97  
     of freight, 97  
     of the ship, 97  
     partial loss, 100  
     policies, 97  
         open, 97  
         time, 97  
         valued, 97  
         voyage, 97  
     ship, 99  
     stamp required, 98  
     terms of policy, 98  
     the memorandum, 99  
     total loss, 100  
     underwriting, 96  
         by companies, 96  
         by Lloyd's, 96  
     warranties, 98  
         deviation, 99  
         legality of voyage, 99  
         seaworthiness, 99  
     what may be insured, 97  
 Market overt, 91  
 Married women—  
     cannot be imprisoned for debt, 1  
     capacity to contract, 20  
         as agent for husband, 22  
         as to separate estate, 20  
         with husband, 22  
     contracts bind separate estate, 21  
     divorced, capacity to contract, 20  
     judicially separated, capacity to contract, 21  
     protecting order, effect of, 21  
     restriction on alienation, 21  
     separate estate, 21

Married women—trading in city  
of London, 20  
when she can trade, 1, 20  
Married Women's Property Act,  
1882, 21  
Master of ship, powers of, 132  
Memorandum under Statute of  
Frauds, 74  
Mercantile property, 6  
Misrepresentation, 43  
of fact, 44  
by party to the contract, 44  
inducing the contract, 44  
of law, 44  
remedies for, 46  
Mistake, 40  
as to existence of subject  
matter, 41  
as to identity of thing sold, 42  
as to nature of the contract, 42  
as to party, 41  
of one party known to the  
other, 43  
Money borrowed by infants, 18  
Mortgage, 161  
Moveable property, 6, 7  
by what law governed, 155  
descends to next-of-kin, 7  
NATIONAL Debt, 8  
Necessaries—  
contracts by infants, 19  
for lunatic, 23  
what are, 19  
Negotiable instruments, 48  
Non-disclosure, 43  
OFFER—  
bid at auction, 12  
invitation of, 12  
made by time-tables, 12  
revocation of, 14  
where time allowed for ac-  
ceptance, 15  
Official receiver, 145  
Oral contracts, 30  
Order of discharge, 151  
Ownership, 161  
transfer of, 89

Ownership—  
(a) ascertained goods, 89  
(b) unascertained goods, 89  
PARTIAL loss, 100  
Partnership, 54  
accounts, 58  
agreement for, 54  
application of assets, 59  
books, 58  
death of partner, 59  
debts of firm, 56  
liability of partner's separate  
property, 56  
dissolution of, 58  
by court, 60  
effects, 59  
duties of partners, 57  
indemnity of partners, 58  
interest varying with profits, 54  
law in Scotland, 56  
liability of partners, 56  
when it ends, 56  
management, 58  
nature of, 21, 54  
persons "holding out," 56  
powers of partners, 55  
cannot bind firm by seal, 55  
" give guarantee, 55  
" submit to arbitration,  
55  
each partner an agent, 55  
personal liability of partner, 56  
property of, 57  
land, 57  
rights of partners, 57  
sharing in losses, 57  
" in profits, 57  
profits, evidence of, 54  
undisclosed profit, 57  
Part payment, 74  
Past consideration, 32  
Patents, 9  
Payment—  
of bill of exchange, 136  
of price, 50  
to agent, 88  
of price by bill, 80

Payment of price by cheque, 89  
 Performance of contracts, 50  
     by payment, 50  
     by tender, 50  
     failure of, 50  
     impossibility of, 51  
     possibility of, 38  
 Personal property, 7  
     " representatives, 161  
 Pilotage, 127  
 Policy of insurance, fire, 104  
     life, 101, 164  
     marine, 167  
 Possibility of performance, 38  
     absolute impossibility, 38  
     actual impossibility, 39  
     legal impossibility, 39  
 Premium, 95  
 Prerogative, 161  
 Price, 70  
     payment of, 87  
         legal tender, 89  
 Principal and agent, 60. See Agent  
 Probate duty, by what law governed, 155  
 Promissory note, 141  
 Proof of debts, 148  
 Property, 161  
 Proposal for life insurance, 101  
 Public funds, 8  
  
 RATIFICATION, of contracts by infants, 20  
 Reality of consent, 40  
 Resale of goods, 86  
 Resolution, 162  
 Restraint of trade, 35  
     agreements relating to, 36  
     reasonable restraints, 35  
 Revocation of offer, 14  
     at auction, 14  
     communication of, 16  
     expressly, 15  
     impliedly, 15, 16  
     time from which it dates, 16  
     to supply goods, 15  
     where time allowed, 15

Rights, assignment of, 46  
 Rights of action, 7

#### SALE, 69

by tender, 13  
 of goods, 69  
     agreement for sale, 69  
     *caveat emptor*, rule of, 78  
     conditions, 79  
     delivery, 84  
     duties of buyer, 87  
     form of contract, 71  
         over £10 in value, 72  
             (a) acceptance and receipt, 72  
             (b) earnest or part payment, 73  
             (c) memorandum or note in writing, 74  
                 contents, 74  
                 form, 74  
                 signature, 76  
         under £10 in value, 71  
     lien of seller for price, 85  
     memorandum in writing, 69  
     ownership, transfer of, 89  
     payment of price, 87  
     price, 70  
         must be fixed, 70  
         reasonable, 70  
     remedies of seller and buyer, 93  
     right of disposition reserved, 91  
     Statute of Frauds, provisions of, 71, 72  
     stoppage *in transitu*, 86  
     title acquired by buyer, 91  
     warranties, 79  
         implied, 80  
             as to description, 79  
             fitness for purpose, 83  
             manufacture, 82  
             merchantable quality, 79  
         written contracts, 74  
         variation in, 78  
 Salvage, 131

- Sample, sale by, 81  
 Sealing, what amounts to, 26  
     when required, 27  
 Seaworthiness, 113  
 Secured debts, 148  
 Security, 162  
 Set of bills, 162  
 Shares, 5, 8  
     allotment of, 5  
     application for, 5  
     calls, 5  
     transfer of, 8  
 Shipping—  
     bills of lading, 122  
     bottomry bond, 132  
     charter-party, 112  
     freight, 113, 120  
     general average, 131  
     implied warranties, 113  
     marine insurance, 96  
     powers and duties of master,  
         132  
     salvage, 131  
     total loss, 100  
 Signature in written contract, 69  
 Simple contracts, 29  
     consideration necessary, 29  
     writing, when required, 29  
 Slip, the, 97  
 Sold note, 14  
 Sole traders, 1  
 Special manager, 146  
 Stamp on bill of exchange, 136  
 Statute of Frauds, 71, 72, 107  
 Statute of Limitations, 111  
 Stock, 8  
     how it differs from shares, 8  
     how transferred, 8  
     in public funds, 8  
 Stoppage *in transitu*, 86  
 Sub-agents, 66  
 Succession duty, by what law  
     governed, 155  
 Sunday, sales on, 34  
 Surety. See Guarantee, 107  
 TENDER, 50  
     sale by, 12  
     to supply goods, an offer, 14  
 Title, 162  
     acquired by buyer, 91  
     stolen goods, 91  
 Tort, 162  
 Total loss, 100  
     actual, 100  
     constructive, 100  
 Trademark, 10  
 Trade, restraint of, 35  
 Transfer, of bill, 137  
     of British ship, 26  
     of sculpture, 26  
     of shares, 26  
 Trustee, 162  
     in bankruptcy, 147  
*Ultra vires*, 162  
 Underwriting—  
     policies, 96  
     shares, 162  
 VOIDABLE contracts, of infants,  
     20  
 Void contracts—  
     distinguished from voidable con-  
         tracts, 24  
     of infants, 18, 20  
     of lunatics, 24  
 WAIVER of liability, 33  
 Warranty, on sale of goods,  
     express, 80  
     where sale by sample, 81  
 Weights, use of improper, 35  
 Winding up a company, 5  
 Writing, when required in con-  
     tracts, 29  
 Written contract, sale of goods,  
     75

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